MODERN REPORTS;

OR,

SELECT CASES

ADJUDGED IN

THE COURTS

OF

KING'S. BENCH, CHANCERY, COMMON PLEAS, AND EXCHEQUER.

VOLUME THE SECOND;

CONTAINING,

A Collection of Several Special Cases, most of them adjudged in the Court of COMMON PLEAS, from the Twenty Sixth to the Thirtieth Year of CHARLES THE SECOND, when Sir FRANCIS NORTH, *Knight*, was Chief Justice of the said Court — To which are added, Several Select Cases in the Courts of CHANCERY, KING'S BENCH, and EXCHEQUER, during the said Years.

THE FIFTH EDITION,

CORRECTED

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

By THOMAS LEACH, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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1793.

TO THE

RIGHT HONOURABLE

JOHN LORD SOMERS,

BARON OF EVESHAM,

LORD HIGH CHANCELLOR OF ENGLAND.

MY LORD,

WHEN both the favour and ſeverity of the laws were, by partial and unuſual methods, applied to *the perſons*, and not to *the caſes*, of the accuſed; when the life and honour of an unfortunate man depended on the arbitrary dictates of ſome men in authority; and when the ſentence pronounced was more criminal than the offence of which the party was too eaſily convicted; then was YOUR LORDSHIP as far from any advancement to a judicial office, as your judgment and inclinations were from the approbation of ſuch proceedings: but no ſooner were places of honour and profit in the law made the unſought rewards of good and learned men, than YOUR LORDSHIP's merits entitled you to both; whoſe moderation and

temper will make your adminiſtration juſt and eaſy in that honourable court to which fortune had no ſhare in promoting you; and whoſe natural abilities are ſo improved by a continued and inflexible ſtudy, that your knowledge is not alone confined to the municipal laws of this nation, but is, generally, extended to all human learning.

WHAT ſervices may not A PRINCE expect from the wiſdom and vigilance of ſuch A COUNSELLOR? and what benefit may not a divided people find by your equal diſpenſation of juſtice? a people who muſt be united, if they can be united in any thing, in the general ſatisfaction which all have in your promotion; becauſe they know that the cauſes which come before YOUR LORDSHIP will receive a due hearing and attention, without paſſion or prejudice to perſons; ſuch emotions being as much beneath the greatneſs of YOUR LORDSHIP's mind, as they are beyond the duty of JUSTICE, and fit only for ſuch who will neither be guided by the rules of equity or reaſon; ſo true is that ſaying, *Utitur animi motu, qui uti ratione non poteſt.*

THE reſpect which is due to the office of magiſtrates challenges an univerſal obedience; but that particular affection and eſteem which we have for their perſons is due only to their virtues and merits: and ſuch is that which I have, and all men (eſpecially thoſe of my profeſſion) ought to have, for YOUR LORDSHIP and the preſent JUDGES in WESTMINSTER-HALL, whoſe learning and integrity in judicial determinations may bring the laws nearer to perfection, and whoſe examples are the juſt commendation of the preſent, and, I hope, will be the imitation of ſucceeding ages.

I COULD

I COULD never underſtand the right meaning of that ſentence, *Boni judicis eſt ampliare juriſdictionem*; for if that be true, then to what purpoſe were thoſe arguments at the bar of the HOUSE OF PEERS againſt ſome late JUDGES for retaining bills *in equity*, the ſubject matter whereof was only triable at the *common law*? Such complaints are now no more; becauſe YOUR LORDSHIP will not only ſupport the honour and dignity of that court wherein you preſide in the beauty of order, but will not enjoin any other from exerciſing its proper juriſdiction. See 1 Burr. Rep. 301. 304. Lord Mansfield's explanation of this maxim.

THUS will the credit of THE LAWS OF ENGLAND be revived, and men will acquieſce under the legal determinations of each court. Very few *writs of error* will be brought for error *in law*, becauſe of the juſtice and ſtability of the judgment in that court wherein the law is given; and very few *appeals*, becauſe YOUR LORDSHIP knows ſo well how to temper *equity* with *juſtice*, that he muſt be a very angry man indeed who goes away diſſatisfied with YOUR LORDSHIP's decree.

BUT ſince the actions of men in great places are ſubject to the various cenſures of mankind, if any prejudiced perſon ſhould revive thoſe diſputes, or quarrel at YOUR LORDSHIP's adminiſtration, ſuch complaints would leave no other impreſſion upon the minds of impartial men than to convince them of the wrong done to YOUR LORDSHIP, and of the folly of ſuch miſapprehenſions.

MY LORD, I have prefixed YOUR LORDSHIP's name to this mean performance, taking this occaſion to ſhew the great honour and reſpect which I have for YOUR LORDSHIP: not that I am ſo vain to think any thing herein

to be worthy of YOUR LORDSHIP's leiſure ; neither do I think it manners to beg YOUR LORDSHIP's patronage ; becauſe a *good book* will protect itſelf at all times, and *a bad one* deſerves no protection.

I KNOW few books are either praiſed or peruſed but what are warranted by the common repute and eſteem of the writer ; which muſt be imputed to the prejudice and partiality of men, and which argues a diffidence of our natural parts, as if we did not dare to make a right uſe of our own judgments. For this reaſon I have concealed my name, that a judgment may not be made of *the book* by the repute of *the writer*.

BUT I hope YOUR LORDSHIP will not condemn my ambition, when I ſay, I am not altogether unknown to YOUR LORDSHIP, who am

YOUR LORDSHIP's

Moſt Humble Servant,

W. J.

Middle Temple,
June 22, 1693.

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HILARY TERM,

The Twenty-Sixth and Twenty-Seventh of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt.* *Chief Justice.*
Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.* } *Justices.*
Sir William Ellis, *Knt.*
Sir William Jones, *Knt.* *Attorney General.*
Sir Francis Winnington, *Knt.* *Solicitor General.*

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*[1]

Case 1.

* The King *against* the Bishop of Rochester and Sir Francis Clark.

QUARE IMPEDIT. A special verdict was found, wherein the Case was thus:—The manor of *Laburn*, to which the advowson of the church of *Laburn* was appendant, did, by the dissolution of monasteries, by the statute 31. *Hen.* 8. c. 13. come to the king, who granted the said manor to the *Archbishop of Canterbury*, excepting the advowson; and afterwards the said archbishop regrants the same to king *Henry the Eighth*, and the advowson of the church of *Laburn* aforesaid; and then king *Henry the Eighth* grants the said manor of *Laburn*, *et advocation. ecclesiæ de* LABURN *dicto archiepiscopo* (having named him before) *dudum spectan.* and which was regranted to the said king by the said archbishop, and lately belonging to the abbot of *Grey-church*, &c. "*adeo plenè* as the said archbishop or abbot had "it, or as it was in our hands by any ways or means howsoever."

If a manor formerly in the possession of an *abbot*, and to which manor an advowson was appendant, be granted to an *archbishop*, with an exception of the advowson, the appendancy is thereby destroyed; but if the archbishop re-convey the manor to the king, describing the advowson as appendant, a subsequent grant of the said *manor* and advowson to the said archbishop formerly belonging, and which was re-granted to the king by the said archbishop, and lately in the possession of the abbot "*adeo plenè*, as the said *archbishop* or *abbot* "had it, or as it was in our hands by any ways and means whatsoever," will pass the *advowson*, although it never did belong to the *archbishop*,—S. C. 1. Mod. 195. S. C. 3. Keb. 412. 1. Roll. Rep. 23. Cro. Eliz. 34 48. Yelv. 42. 3. Leon. 162. Ld. Ray. 50. 297. 300. 4. Bac. Abr. 212. Cowp. 9. 630. 1. H. Bl. Rep. 426.

The

THE KING *against* THE BISHOP OF ROCHESTER AND SIR FRANCIS CLAKE.

The queſtion was, Whether the advowſon paſſed by this laſt grant?

The THREE JUSTICES (*abſente* NORTH, *Chief Juſtice*) gave judgment for the defendant, that the advowſon did paſs by this grant.

* [2]

1. Com. Dig. 377.

2. Term Rep. 415.

* ELLIS, *Juſtice*, in his argument ſaid, It was plain that when the manor came to *Henry the Eighth* the advowſon was *appendant*; but when it was granted to the archbiſhop, and the advowſon excepted, it then became *in groſs*, and therefore could never afterward be appendant (*a*); as an acre once diſunited from the manor can never after be part of that manor: *Liſord's Caſe*, 11. *Co.* 46. And it is as plain, that before the ſtatute *de Prærogativâ Regis*, *cap.* 15. that, in the caſe of the king, by the grant of a manor, the advowſon though not named paſſed, much more if it be named in any part of the deed, as if it be in the *habendum* though not in the *premiſes*; but that muſt be intended of an advowſon appendant. And though advowſons are excepted by that ſtatute, yet in caſe of reſtitution an advowſon will paſs by the words "*adeo plenè et integrè*," though not named (*b*). In this caſe there are general words, and the ſame as in *Whiſtler*'s *Caſe* (*c*); yet this differs from that, for here it is granted "*adeo plenè*," as the abbot had it; by thoſe words it doth not paſs, for then it was appendant, but now it is in groſs; and if the king intend to paſs an advowſon as appendant when it is in groſs, the grant is void, *Hob.* 303. In *Whiſtler's Caſe* there are the words "*adeo plenè*," as in this, and the advowſon was appendant ſtill, but yet there are general words here that will paſs it: "*adeo plenè* as the archbiſhop had it," will not ſerve, becauſe he never had it; neither will "*adeo plenè* as the abbot had it," paſs this advowſon, becauſe he had it in groſs; but "*adeo plenè* as the king had it by any ways or means whatſoever," thoſe general words are ſufficient to paſs it. The king grants the manor and the advowſon of the church of *Laburn*, which is certain and by particular name. Part of what follows, as "*ſpectan.* to the archbiſhop," is falſe, for it never belonged to him, becauſe it was excepted in the grant of the manor to him; but the firſt deſcription being full and certain, the falſity of the other ſhall not avoid the grant, eſpecially when the king is not deceived in his title nor in the value, and when there is a certainty of the thing granted. Some falſe ſuggeſtions may make his grant void; as if he grant the manor of *D.* reciting that it came to him by *attainder* when it came by *purchaſe* (*d*).—But if the miſrecital concern not the king's title or profit, it doth not vitiate the grant, 10. *Hen.* 2. 4. *Sir John Leſtrange's Caſe* (*e*); where the king, by office found, had the wardſhip of a manor, and made a grant

(*a*) See James *v.* Johnſton, poſt. 141.

(*b*) Whiſtler's Caſe, 10. Co. 63.

(*c*) See the Attorney-General *v.* Turner, poſt. 106.

(*d*) Hob. 229.

(*e*) Lane, 11.

thereof,

THE KING *against* THE BISHOP OF ROCHESTER AND SIR FRANCIS CLARK.

thereof, reciting, "*quod quidem manerium in * manus nostras seisit,* "*&c.*" which was not true, yet the grant was held good, because it was only to make that certain, which was certain enough before by a particular description. So in *Legat's Case*, 10. *Co.* 113. (*a*); wherein is cited the case of the *Earl of Rutland* and *Markham*, to whom the queen had granted the office of parkership, &c. "*quod* "*quidem officium* the late EARL OF RUTLAND *habuit*," when in truth the earl never had it before, yet the grant was held good. So also if he grant "for and in consideration of service done," or "money "paid," if false, it avoids not the grant, because such considerations (when past) are not material, whether they are true or false (*b*). If the king let the manor of *D.* of the value of four pounds *per annum*, if it be more it is ill; but if he let it by a particular name, and then add, "*quod quidem manerium* is of such a value," it is good, because the "*quod quidem*" is but the addition of another certainty: so here the advowson is granted by special and express name, but the clause that follows, "*dudum spectan.* to the arch-"bishop," implies a mistake; and had there been no more in the case, this falsity would never have avoided the grant. But when the king had enumerated several ways by which he thought he might be entitled, at last, as a proof that he was resolved to pass it, he adds these words, *viz.* "as it is in our hands by any way or "means whatsoever."

ATKINS, *Justice*, of the same opinion. Where the thing is not granted by an express name, there, if a falsity be in the description of that thing, the grant is void, even in the case of a common person; as if he grant lands lately let to *D.* in such a parish, and the lands were not let to *D.* and were also in another parish, the grant is void, because the lands are not particularly named (*c*), *Anders.* 148. *Heywood's Case.* *A fortiori* in the case of the king; as if he grant *omnia illa tenementa situata in Wells*, when in truth the lands did not lie there, for this reason the grant was void, because it was general, and yet restrained to a particular town, and the pronoun "*illa*" goes through the whole sentence. But if a thing be granted by an express name, though there is a falsity in the description, yet in the case of a common person it is good. As where the subchantor and vicars-choral of *Litchfield* made a grant to *Humfrey Peto* (*d*), of seventy-eight acres of glebe, and of their tithes predial and personal, and also of the tithe of the glebe, "all which late were in the occupation of *Margaret Peto*," * which was not true, yet the grant was adjudged good; for the words "all which" are not words of restriction, unless when the clause is general and the sentence entire, but not when it is distinct. *Cro. Car.* 548. But in the case of the king, if there be a falsity by which the king hath a prejudice, and a falsity upon the suggestion of the party, it will make the grant void; but every falsity will not * [4]

(*a*) S C. 2. Roll. Abr. 188. S.C. Hughes Ent. 121.
(*b*) Cro. Jac. 34.
(*c*) Heywood *v.* Ifgrave, And. 148.
(*d*) Moor, 881. Hob. 229. 2. Bac. Abr. 662.

THE KING *against* THE BISHOP OF ROCHESTER AND SIR FRANCIS CLARK.

avoid his grant if it be not to his prejudice. But let the falsity in this case be what it will, the "*adeo plenè* as it is in our hands," helps it. And though it hath been objected, that these words will not help the grant, because nothing new is granted, that being done before; it is true there is nothing new granted, but that which was before was not well granted till this clause came, which supplies and amends the falsity; for now it is apparent that the king intended to pass the advowson as well as the manor, and therefore at last grants it, be his title what it will. In all cases where the king's grant is void because of any mistake in his title, it is to be intended the king would not make the grant, unless the title were so as it is recited; but here it is apparent the king resolved to grant it.

WYNDHAM, *Justice*, agreed; and judgment was given accordingly.

Case 2.

Wilcox *against* The Servant of Sir Fuller Skipwith.

Replevin. If the defendant justify the taking for a *heriot* due upon every alienation without notice, the plaintiff may deny the heriot being due upon alienation.

REPLEVIN. The defendant justifies the taking of the cattle for a *heriot*, which he alledges to be due upon every alienation without notice. The plaintiff denies the heriot to be due upon *alienation*. And thereupon issue is joined.

The special verdict finds the tenure to be by fealty and the rent of 3s. 1d. (though the defendant in his avowry had alledged the rent to be 12s. 4d. and the plaintiff in his bar to the avowry had confessed it to be so) suit of court and a *heriot*, which was payable upon every *alienation* with or without notice.

8. Mod. 52, 53. 12. Mod. 84. 188. 319. Ld. Ray. 152.

And, Whether, upon this special verdict, judgment should be given for the plaintiff or the avowant? was the doubt.

174. 332. 466. 504. 1017.

In replevin, a plea acknowledging the taking "*in prædicto loco*," without saying *tempore quo*, is good.

JONES, *Serjeant, for the defendant*, said upon the point of pleading, it had been objected, That the avowry was ill, for "*ut ballivus, &c. bene cogn. captionem in prædicto loco, &c.*" but doth not say *tempore quo, &c.* for a heriot (*tempore quo, &c.* * being left out); and so doth not say *a heriot* was due at the time of the taking of the goods. But he answered, That THAT was usual and common: and of that opinion were all the Justices; and so it was held good.

* [5]

Cro. Jac. 372. Lut. 1232. 5. Mod. 77. 5. Com. Dig. "Pleader" (3. K. 14.).

If on an avowry for a heriot, shewing tenure by fealty and *twelve shillings* rent, the plaintiff admit the tenure, and traverse the prescription, and the jury find a tenure by *three shillings* rent; this *variance* is not material.—2. Roll. Abr. 691. Dyer, 183. Hob. 54. 3. Leon. 80. Ld. Ray. 152. Stra. 231. 316. 889. 892. 909. 1131. 5. Com. Dig. "Pleader" (S. 17.). Comp. 766. 1. Term Rep. 447.

SECONDLY, It was farther objected, That here is *a variance* between the avowry and the finding in the special verdict. The avowant says, that the rent was *twelve shillings and fourpence*, and the jury find that it was but *three shillings and a penny*. He also saith, that the heriot was due upon every alienation *without*

notice,

notice, and they find it due *with or without notice*. But to that, he said, the jury have doubted only of the last point, for the avowry was not for rent but for the heriot; so the substance is, Whether he had good cause to distrain for the heriot or not?— And as to that, the substance is sufficiently found, like the case in *Dyer*, 115. Debt upon bond for performance of covenants, and not to do waste, the breach assigned was, that the defendant felled *twenty* oaks, who pleads *non succidit viginti quercus præd. nec earum aliquam*; the jury find he cut down *ten*, yet the plaintiff recovered; for though the intire allegation of the breach was not found, because *ten* did not prove the issue of *twenty* literally, yet the substance is found, which is sufficient to make the bond forfeited. So in trespass, where the plaintiff makes a title under a lease which commenced on *Lady-day habendum à festo*, &c. and the issue was *non demisit modo et formâ*, the jury found the lease to be made upon *Lady-day habendum à confectione*, and so it commenced upon *Lady-day*, and not *à festo*, &c. which must be the day after the feast; yet it was adjudged for the plaintiff, because the substance *(a)* was, Whether or no the plaintiff had a lease to entitle himself to commence an action? *Hob.* 27. But in *ejectment* or *replevin* such a declaration had been naught, because therein you are to recover the term, and therefore the title must be truly set out; and in *replevin* you are to have a *retorno habendo*, but in *trespass* it is only by way of excuse. A second reason is, Because both plaintiff and defendant, in pleading, have agreed the matter in this particular, for both say the rent was *twelve shillings and fourpence*. It is a rule in law, That what the parties have agreed in pleading shall be admitted *(b)*, though the jury find otherwise. Jurors are not bound by estoppel *ad dicend. veritatem*, for they are sworn so to do unless the estoppel be within the same record; but here * that which is confessed cannot be matter of issue, not being *lis contestata*. It has been objected, That in THE YEAR-BOOK of [6] 33. *Hen.* 6. *pl.* 4. b. the plaintiff brought debt for *twenty pounds*, the jury found the defendant only owed *ten pounds*, and the plaintiff could never recover. But that must be intended of a debt due upon contract, and there the least variance will be fatal: 38. *Hen.* 6. *pl.* 1. As to the second variance it is not material, for it is not true, as the avowant hath said; for if the matter in issue be found, the finding over is but *surplusage*; both the verdict and the avowry agree that the defendant may take a distress in case of alienation without notice; and so he prayed judgment for the defendant.

WILCOX *against* THE SERVANT OF SIR FULLER SKIPWITH.

Ld. Ray. 735. 697. Stra. 1171.

THE COURT were all of opinion that judgment should be given for the defendant; for what is agreed in pleading, though the jury find contrary, the Court is not to regard; and here the substance of the issue, as to the second point, is well found for the defendant.

5. Bac. Abr. 316.

(*a*) Moor, 868. Yelv. 148. *Sed Qu.* 13. b. 2. Co. 4. Ld. Ray. 390.
(*b*) 2. Ass. pl. 17. 18. *Edw.* 3. 864. 1521. 1. Barnes, 186.

WILCOX *against* THE SERVANT OF SIR FULLER SKIPWITH.

ATKINS, *Justice*, told SERJEANT WILMOT, who argued for the plaintiff, that he had cited many cases which came not up to the matter, and so did *magno conatu nugas agere*; for which reason I have not reported his argument.

Case 3. Smith *against* Feverell.

To an action of trespass on the case for *disturbance of common*, the defendant may plead *licence* from the lord of the manor; but he must shew, that sufficient common was left for the plaintiff.

S.C. 1 Fre. 190.
S.C. 1. Dan. 810.

THE plaintiff brought an ACTION ON THE CASE against the defendant, setting forth that he had right of common in *A.* and that the defendant put in his cattle, *viz.* horses, cows, hogs, &c. *ita quòd communiam in tam amplo modo habere non potuit.* The defendant pleads a licence from the lord of the soil to put in *averia sua*, which was agreed to comprehend hogs as well as other cattle in the most general sense. The plaintiff demurs.

THE COURT, after argument, were all of opinion that judgment should be given for the plaintiff; because the defendant in his plea hath not alledged that there was sufficient common left for the commoners, for the lord cannot let out to pasture so much as not to leave sufficient for the commoners. And though it was objected, that the plaintiff might have replied specially, and shewn there was not enough, yet it was agreed by the Court that in this case he need not, because his * declaration to that purpose was full enough, and that being the very *gist* of the action the defendant should have pleaded it. It was held indeed that in an action upon the case by *the commoner* against *the lord*, he must particularly shew the surcharge; but if the action be brought against *a stranger*, such a shewing as is here is sufficient.

*[7]

9. Co. 112. 1. Vent. 319. Lut. 103. 107. 1. Sid. 106. 3. Lev. 104. 2. Vern. 116. Ld. Ray. 406. 1134. 3. P. Wms. 257. 1. Bac. Ab. 392. 4 Bac. Abr. 87, *notis*. 2. Bl. Rep. 818. 2. Ter. Rep 391.

NORTH, *Chief Justice*, said, and it was admitted, that the licence being general *ad ponend. averia*, it should be intended only of commonable cattle and not of hogs; *sed contra*, if the licence had been for a particular time.

Case 4. Anonymous.

If a devise be made upon a condition, that the heir at law do not molest the devisee by suit or otherwise, and the heir enters, it is a breach.—Ray. 371. 3. Leon. 71. Hob. 134. 1. Roll. Abr. 427. Cro. Jac. 75. 3. Mod. 28. 2. Com. Dig. "Condition" (M 1.). 3. Bac. Abr. 23.

A MAN devises land to *A.* his heir at law, and devises other lands to *B.* in fee, and saith, "If *A.* molest *B.* by suit or "otherwise, he shall lose what is devised to him, and it shall go to "*B.*" The devisor dies; *A* enters into the lands devised to *B.* and claims it.—THE COURT were of opinion, that this entry and claim is a sufficient breach to entitle *B.* to the land of *A.*

A devise of lands to *A.* the heir, and of other land to *B.* "and if *A.* molest *B.* by suit or otherwise, he shall lose his land," is *a limitation*, and not *a condition*.—1. Roll. Abr. 411. Ray. 237. 10. Co. 40. 1. Leon. 283. 1. Mod. 86. Cro. Eliz. 833. 919. Cro. Jac. 592. Cro. Car. 577. Plowd. 420. Abr. Eq. 206. Comyns, 72. 123. 2. Vern. 510. Stra. 129. 145. 1086. 1128. 2. Atk. 259. 1. Vezey, 420. 3. Bac. Abr. 403. 405. 4. Bac. Abr. 322, 323.

IT WAS ALSO AGREED, that these words, "If *A.* molest *B.* by "suit, &c." make *a limitation* and not *a condition*, the devise being

to the heir at law; for if it were *a condition*, it descends to him; and so it is void, because he cannot enter for the breach: so, *paying* in the case of the eldest son makes a limitation. 3. *Co.* 22. *Cro. Eliz.* 204. *Wellock and Hamond's Case. Owen*, 112. So in the case of *Williams v. Fry* in an ejectment in the king's bench lately for *Newport-House*, *A.* deviseth to his grand-daughter, "provided and upon condition that she marry with the consent of the "*Earl of Manchester* and her grandmother," it is a limitation. ANONYMOUS. See 1 Mod. 86. and 300.

SECONDLY, It was agreed, That an entry and claim in this case was a sufficient molestation; for when the heir enters and claims generally, it shall be intended as heir; and the words, "that "he shall not molest by suit or otherwise," are to be intended *occasione præmissorum*. If an *heir* enter and claim generally, it shall be intended that he entered and claimed *as heir*.

Moor, 633. Carter, 171. Co. Lit. 214. 10. Co. 40. 4. Burr. 1937.

THIRDLY, There is no need of entry to avoid an estate in case of a limitation; because thereby the estate is determined without entry or claim, and the law casts it upon the party to whom it is limited, and in whom it vests till he disagrees to it. *A.* devises land to *B.* and his heirs, and dies; it is in the devisee immediately; but indeed till entry he cannot bring a possessory action, as trespass, &c. *Pl. Com.* 412, 413. 10. *Co.* 40. b. * Where a possession vests without entry, a reversion will vest without claim. There is no need of an entry to avoid an estate in the case of a *limitation*. Co. Lit. 236. 214. *[8] Vaugh. 32.

Moor, 99. Carter, 171. 10. Co. 40. 1. Vent. 203. Ld. Ray. 750. 1. Bl. Rep. 613.

Rogers *against* Davenant. Case 5.

IN PROHIBITION the question was, Whether, if a church be out of repair, or so much out of order that it must be re-edified, the bishop of the diocese may direct a commission to impower commissioners to tax and rate every parishioner for the re-edifying thereof? A bishop cannot appoint commissioners to tax the parish towards building or repairing a church.

THE COURT unanimously agreed, that such commissions are against law, and therefore granted *a prohibition* to the spiritual court to stop a suit there commenced against some of the parishioners of *Whitechapel* for not paying the tax according to their proportions. S. C. 1. Mod. 194. 10. Mod. 13. 12. Mod. 9. 83. 327. 1. Vern. 276.

301. Ld. Ray. 59. 512. Stra. 576. 1145. 1. Bac. Abr. 373.

IT WAS AGREED, that the spiritual court has power to compel the parish to repair the church by their ecclesiastical censures, but they cannot appoint what sums are to be paid for that purpose, because the churchwardens, by the consent of the parish, are to settle that. As if a bridge be out of repair, the justices of peace cannot set rates upon the persons that are to repair it, but they must consent to it themselves (*a*). These parishioners here who contribute to the charge of repairing the church, may be spared; but as for those who are obstinate, and refuse to do it, the spiritual court may proceed to excommunication against them; but there may be a libel to pay the rates set by the churchwardens. If a rate be made by the vestry for the repair of the church, the spiritual court may enforce the payment of it. S. C. 1. Mod. 194. 236. Post. 222. Fort. 346. 4. Com. Dig. 501.

(*a*) See the 1. *Ann.* St. 1. c. 18. and 12. *Geo.* 2. c. 29. 1. Hawk. P. C. 449.

Case 6.

Nurse *against* Yearworth.

In the Court of Chancery.

RICHARD YEARWORTH, being seised of lands in fee, makes a lease to the defendant *Christopher Yearworth* for ninety-nine years, to such use as by his last will he should direct.

Afterward he makes his will in writing (having then no issue, but his wife *grossement enseint*), and thereby devises the same land "to the heirs of his body on the body of his wife begotten; and for "want of such issue, to the said *Christopher* (the defendant) and "his heirs." *Richard* dies, and, about a month after, a son is born. The son by virtue of this devise enjoys the land; but when he attains his full age of one-and-twenty years, he suffers a common recovery, and afterwards devises the land to the complainant *Nurse*, and dies. * [9] The complainant exhibits a bill against the defendant to have the lease for ninety-nine years assigned to him.

The question was, Whether he should have it assigned or not?

FIRST, It was pretended that an estate in fee being limited by the will to *Christopher*, who was lessee for ninety-nine years, the term is thereby drowned *(a)*.

SECONDLY, It was objected, That the devise by *Richard* to the infant *in ventre sa mere* was void; and then the complainant, who claimed by a devise from the *posthumus*, could have no title, but that the defendant to whom an estate was limited by the will of *Richard* in remainder should take presently.

FINCH, *Lord Keeper*, notwithstanding what was objected, decreed that the lease which was *in trust* should be assigned to the complainant *Nurse*. He said, that at the common law, without all question, a devise to an infant *in ventre sa mere* of lands devisable by custom was good: so that the doubt arises upon the statute of 34. *Hen.* 8. c. 5. which enacts, "that it shall be lawful for a "man by his will in writing to devise his lands to any person or "persons;" for in this case the devisee, not being *in rerum natura*, in strictness of speech is no person; and therefore it hath been taken, that such a devise is void, *Moor's Rep.* 177.; and it is left as *a quære* in the *Lord Dyer*, 304. *(b)* But in two cases in the common pleas, one in the time when the LORD CHIEF JUSTICE HALE was Judge there, the other in the LORD CHIEF JUSTICE BRIDGMAN's time, it was resolved, that if there were sufficient and apt words to describe the infant, though *in ventre sa mere*, the devise might be good. In the king's bench, the Judges since have been divided upon this point, that as the law stands now adjudged, this devise in our case seems not to be good: but should the case come now in question, he said, he was not sure that the

A. being seised in fee, makes a lease for ninety-nine years to *B.* to the uses of his will, and devises his estate to "the heirs of "his body on "the body of "his wife be-"gotten; and "for want of "such issue, to "the said *B.* "in fee." Equity will decree the assignment of this *trust-term* to a *posthumous* heir of the testator's, of whom his wife was *enseint* at the time of his death, notwithstanding the *term* was extinguished in law by uniting in *B.* with the *remainder in fee.*

S. C. Finch. Ch. Rep. 155. Post. 292. 11. *Hen.* 6. pl. 13. 1. Ro. Ab. 609. Godb. 385. 3. Co. 20. 7. Co 37. a. 2. Vern. 711. Prec. Chan. 50. Abr. Eq. 173. Stra. 1092. Andr. 263. 3. Br. Parl. Ca. 452. Salk. 228. Powel on Dev. 321.

(*a*) See Silvester *v.* Wilson, 2. Term Rep. 444.

(*b*) And see the case of Snow *v.* Cutler, 1. Lev. 135. 1. Sid. 153. 1. Salk. 229. Godb. 386, where it is said, that the record is different from the case as reported by *Dyer*. See Powell on Devises, 326.

law

law would be so adjudged; for it is hard to disinherit an heir for want of apt words to describe him; and there is all the reason in the world that a man's intent, lying *in extremis*, when most commonly he is destitute of counsel, should be favoured *(a)*.

NURSE against YEARWORTH.

(a) See the case of Hale v. Hale, Prec. in Ch. 50.; Scattergood v. Edge, Salkeld, 229.; Musgrave v. Parry, 2. Vern. 710.; Beale v. Beale, 1. Peer. Wms. 246.; Northey v. Strange, 1. Peer. Wms. 342.; Ellison v. Ellison, 1. Vezey, 111.; Burdet v. Hopegood, 1. Peer. Wms. 487.; Edwards v. Freeman, 2. Peer. Wms. 446.; Wallis v. Hudson, 2. Atk. 115. Hargrave's Co. Lit. 11. b. note (4); the Attorney General v. Crispin, 1. Bro. Ch. Rep. 386.; Gulliver v. Wichel, 1. Wils. 105.; and Fearne's Cont. Rem. 428.

*[10]

* Whitrong *against* Blaney.

Case 7.

THIS Term the Court delivered their opinions in this case, NORTH, *Chief Justice*, who had heard no arguments herein, being absent. The case was this: The plaintiff upon a judgment in this court sues out a *scire facias* against the heir and the terre-tenants, which was directed to a sheriff of *Wales*. The defendant is returned terre-tenant, but he comes in and pleads "*non tenure*" generally, and traverses the return. The plaintiff demurs. Two points were spoke to in the case.

The writs of *scire facias*, *capias ad satisfaciendum*, and *fieri facias*, run into *Wales* on a judgment in *Westminster*; but on a *scire facias* against heir and terre-tenants, if the sheriff return the defendant terre-tenant, he cannot plead "*non tenure*" and *traverse* the return.

FIRST, Whether the defendant can traverse the sheriff's return?—And all THE THREE JUSTICES agreed that he cannot *(a)*.

SECONDLY, Whether a *scire facias*, *capias satisfaciendum*, *fieri facias*, &c. would lie into *Wales* on a judgment here at Westminster?—And THEY AGREED it would well lie *(b)*.

ELLIS, *Justice*, agreed, if judgment be given in *Wales*, it could not be removed into the chancery by *certiorari*, and sent hither by *mittimus*, and then execution taken out upon that judgment here, because such judgments are to be executed in their proper jurisdictions; and such was the resolution of the Justices and Barons, *Cro. Car.* 34. But on a judgment obtained here execution may go into *Wales*. No execution can go into *the Isle of Man*, because it is no part of *England*, but *Wales* is united to *England* by the statute of 27. *Hen.* 8. c. 26.; and therefore in *Bedo v. Piper*, 2. *Bulstr.* 156. it was held, that such a writ of execution goes legally into *Wales*. He said, he had a report of a case in 11. *Car.* 2. where a motion was made to quash an *elegit* into *Wales*; but it was denied, for the Court agreed the writ well issued. Some have made a difference between *the king's bench* and *the common pleas*, as if an execution might go into *Wales*

S. C. 3. Keb. 170. S. C. 1. Freem. 109. 146. 173. 8. Mod. 135. 146. 374. Stra. 553. 630. 704. 945. 1208. Ld Ray. 1140. 1. Ro. Ab. 395. Cro. Car. 332. 1. Mod. 64. 68. Dougl. 213. note (10).

(a) A sheriff's return of a *rescous* cannot be traversed. Dyer, 212. Cro. Eliz. 780. See 2. Term Rep. 155.

(b) An indictment for a riot may be removed by *certiorari*, Sir John Carew's Case, Cro. Jac. 484. So also will a *capias*, Hetley, 20. by the opinion of DODDERIDGE, *Justice*. 1. Roll. Abr. 395. But TWISDEN, *Justice*, denied it, 2. Saund. 194.—*Note to the* FOURTH EDITION.

upon

WHITRONG against BLANEY.

upon a judgment obtained in the king's bench, but *aliter* if in the common pleas. But the law is the same in both courts. *Mich.* 1653. between *Wyn and Griffith*, this very case came in question; and there it was held, that execution goes into *Wales* as well as into any part of *England* upon a judgment in the courts of *Westminster*. * In 2. *Bulstr.* 54. *Hall v. Rotheram*, it was held, that a *capias ad satisfaciendum* shall go into *Wales* against the bail, upon a judgment recovered in the king's bench here against the principal.

*[11]

Cro. Eliz. 872. ATKINS, *Justice*, was of the same opinion; and that the defendant cannot aver against the sheriff's return, nor a bishop's certificate: the true reason is given by LORD COKE in 2. *Inst.* 452. for the sheriff is but an officer, and hath no day in court to justify his return. In special cases exception may be made to the sheriff's return; but this is by reason of the special provision that is made for the doing of it by the statute of *Westminster the Second*, c. 39.; as in case too small issues be returned, or that the sheriff return a rescous, the party in his averment must alledge of what value the issues are.—SECONDLY, That notwithstanding the common saying, *Breve domini regis non currit in Walliam*, yet a *fieri facias*, *capias ad satisfaciendum*, or any execution whatsoever, may issue into *Wales* upon a judgment obtained here. And to prove this he considered,—FIRST, How *Wales* formerly stood in relation to *England*:—SECONDLY, How it stood before it was united by the statute of 27. *Hen.* 8. c. 26.—THIRDLY, How it now stands since the Union.—And as to THE FIRST of these, *England* and *Wales* were once but one nation; they used the same language, laws and religion, and so continued till the time of the *Roman* conquest, before which they were both comprehended under one name, *viz.* THE ISLE OF GREAT BRITAIN. But when the *Romans* came, those *Britons* who would not submit to their yoke betook themselves to such places where they thought themselves most secure, which were the mountains in *Wales*; and from whence they came again, soon after the *Romans* were drove away by their dissensions here; and then these *Britons* enjoyed their ancient rights as before. After this came THE SAXONS, and gave them another disturbance, and then the kingdom was divided into *an Heptarchy*; and then also, and not till then, began THE WELSH to be distinguished from THE ENGLISH. But yet at that time they had great possessions in *England*, viz. *Gloucester*, part of *Worcester*, *Hereford*, *Shrewsbury*, which they kept till KING OFFA drove them out of the plain countries, and made them fly for shelter into those mountainous parts in *Wales* where they now continue. And it is observable, that though *Wales* had kings and princes, yet the king of *England* had superiority over them, for to him they were homagers *, *Camden* 67. the word "*Princeps*" implying a subordinate dignity, *Selden's Titles of Honour* 593.—SECONDLY, During the time of the separation *Wales* had distinct laws and cus- [illegible] in *England*: whence that saying took its effect, *Bre*[illegible] *regi*[illegible] *Walliam*, yet the parliament

Camden, 15.

*[12]

ment of *England*, before that time, made laws to bind *Wales*; as the act of 25. *Edw.* 1. for confirmation of the old Great Charter of the liberties of *England* and of the forests, which enacts, that certain duties shall be paid for every sack of wool, &c. exported out of *Wales*, 2. *Inst.* 531. So the statute 3. *Edw.* 1. c. 17. which gives remedy if a distress be taken and detained in a castle, and upon deliverance demanded by the sheriff, if the lord of the castle should refuse, he might raise the *posse comitatûs*, and beat down the castle; and if such detainer or refusal be in the marches of *Wales*, the king, as the statute saith, is sovereign lord of all, and shall do right upon complaint; and the conquest was not made till the ninth year of *Edward the First*, so that at that time likewise, though *Wales* had princes of its own, yet the kings of *England* were sovereigns to those princes; and though they had laws of their own, yet were they bound by those that were made here; and though their princes had ordinary remedial writs, yet in cases extraordinary the king's writs here run into *Wales*; and it was not for want of power, but because there was no need, for that it went so seldom: and when the king's writ did issue, it was necessary to direct it to the sheriff of an English county, for *Wales* was not then divided into shires; but afterwards, by the act called *Statutum Walliæ*, 12. *Edw.* 1. c. it was divided into six counties, and then again by the act of 27. *Hen.* 8. c. 26. it was divided into the other six counties. But during this time there were frequent hostilities between *England* and *Wales*, until by the conquest, in the time of *Edward the First*, they were united. It is pretended that *Henry the Third*, father to *Edward the First*, was the conqueror, and it is probable something considerable might be done in his time; yet the absolute conquest of the whole dominion was made by *Edward the First*, in whose time the aforesaid *Statutum Walliæ* was made, and after that the statute of 27. *Hen.* 8. c. 26. to complete THE UNION, the end of which is declared to bring the subjects of both to an entire unity; and that it may be done with effect, it is enacted, "That the laws of *England* be executed "there;" for which reason it is held in 5. *Co. Rep. Vaughan's Case*, *fol.* 49. that the statutes of *Jeofails* do extend to *Wales*; and * in 2. *Bulst.* 156. *(a)* the sheriff of *Radnor* upon a *scire facias* directed to him, returned, *Breve domini regis non currit*, &c. and was amerced *ten pounds* for his false return. It was objected, That by express provision in the statute of 1. *Edw.* 6. c. 10. *exigent* and *proclamations* shall be awarded out of the courts of *Westminster* into *Wales*; which if they might before, this law was then needless. It is true, the opinion of the parliament seems to be, that had it not been for this particular provision, such proclamations might not have issued; for by 6. *Hen.* 8. c. 4. such proclamations went but to the next county, but they do not declare so;

WHITRONG against BLANEY. Vaugh. 400. 2. Inst. 195. 4. Inst. 239. Vaugh. 414, 415. 2. Bulst. 54. * [13] Vaugh. 414.

(*a*) The point was not debated in this case. See the Year Book 19. *Hen.* 6. pl. 120. Fitz. Abr. "Trial," 40. 13. *Edw.* 3. pl. 23. pl. 24. pl. 34. Fitz. Abr. "Brief," 621. Fitz. Abr. "Assise," 382.

and

WHITRONG *against* BLANEY.

and perhaps they might ground themselves upon that vulgar error, *Breve domini regis non currit in Walliam*, which is not true unless the clause be limited to *original writs* only.—It is objected, That the statute of 5. *Eliz.* c. 23. which enacts, that the *excommunicato capiendo* shall be returned in the king's-bench, and takes notice that this writ is not returnable into that court from *Wales*, and therefore orders that the *significavit* shall be sent by *mittimus* out of the chancery to the Chief Justice there, and gives them power to make process to inferior officers, returnable before them at their sessions, for the due execution of this writ, would all have been in vain, if the *capias* might go into *Wales* before the making this act. But that is *an original writ*, and so comes not up to this case.

WYNDHAM, *Justice*, agreed *in omnibus*; and said, that the statute of 1. *Edw.* 6. c. 10. was very needful; for if a man should be outlawed, if the process should be sent to the sheriff of the next adjoining county in *England*, he could not have any notice that he was outlawed, and so could not tell when outlawed, or at whose suit.

Vaugh. 395. 2. Saund. 194.

VAUGHAN, late *Lord Chief Justice*, held strongly, that no execution would go into *Wales*, when this case was argued before him; and of the same opinion was JUSTICE TWISDEN.

*[14] Case 8.

* Williamson *against* Hancock.

A. being tenant for life, with remainder in tail to his son *B.* remainder to the right heirs of *A.* the tenant for life levies a fine with *warranty* to the use of *C.* in fee, who conveys the estate by bargain and sale to *D.* This collateral warranty is annexed to and runs with the land; and therefore if *B.* attain the age of twenty one years in the life-time of his father, and before the warranty attaches, the fine will bar his entry after the death of *A.*—S. C. 1. Mod. 102. S. C. 3 Keb. 408. S. C. 1. Freem. 162. 188. Co. Lit. 215. 1. Mod. 181. 10. Mod. 204. 142. 12. Mod. 512. Abr. Eq. 179. Fitzg. 14. Co. [illegible] 1d. Ray. 205. S[illegible] 1410. Comyns. 8[illegible] 229. 372. 559. 1. Peer. Wms. 142. 2. Peer. Wms. [illegible] 2. Vern. 325. 419. 548. 12 Mod. 369. [illegible] 112.

A SPECIAL VERDICT was found in an ejectment, where the case was thus:—*Richard Lock* the father was tenant for life, with remainder in tail to *Richard* his son, remainder to the right heirs of the father, who levies a fine with warranty to the use of *Susan* and *Hannah Prinn* in fee; who, by bargain and sale, convey their estate to the defendant. The son, in his father's life-time before the warranty attached, comes of full age: the father dies:

The question was, Whether the son's entry was barred by this *collateral warranty* thus descended?

And THE THREE JUSTICES, *absente* NORTH, *Chief Justice*, were clear of opinion, that the collateral warranty was a bar to the son: and so judgment was given for the defendant.

ELLIS, *Justice*, held, that his entry is taken away; for in every warranty two things are implied, *a voucher* and *rebutter*. He who comes in by voucher calleth the person into court, who is bound in the warranty to defend his right or yield him other land in recompence, and must come in by privity; but if a man have the estate, though he come in *the post* he *may rebut*; that is, he may repel the action of the heir by the warranty of his ancestor, without shewing how the estate came to him, *Fitzh. Nat. Br.* 135. In a *formedon in the discender*, to say the ancestor enfeoffed *J. S.* with warranty, without shewing how *J. S.* came by his estate, is

good,

good. It was objected by SERJEANT MAYNARD, that no person can take advantage of a warranty, who comes in by way of use, as in this case. But it is expresly resolved otherwise in *Lincoln College Case*, 3. *Co.* 62. b.; and the *Prinns* in this case came in by limitation and act of the party, and the defendant, who hath the reversion likewise by limitation of use, though he be in *the post*, shall take benefit of the warranty as assignee within the statute of 32. *Hen.* 8. c. 34. and so it was resolved in *Fowl v. Doble*, in this court, that he who comes in by way of use may rebut; and JONES, *Justice*, in his Report, *fol.* 199. affirms the fourth resolution in *Lincoln College Case* to be law. * It was formerly objected by VAUGHAN, *Lord Chief Justice*, That this warranty goes only to the heirs, not to the assigns, and here the estate was conveyed by the two *Prinns* before the warranty attached. But when the estate passeth, the warranty and covenant followeth, and the assignee shall have the benefit thereof, though not named; and so is the authority of 38. *Edw.* 3. *pl.* 26. If a warranty be made to a man and his heirs, the assignee, though not named, shall rebut, but he cannot vouch. So if *A.* enfeoff *B.* with warranty, and *B.* enfeoff *C.* without deed, *C.* shall vouch *A.* as assignee of the land of *B.* for the warranty cannot be assigned. In this case, though the warranty did not attach before the estate in the land was transferred, yet if it attach afterwards it is well enough, and he who hath the possession shall rebut the demandant without shewing how he came by the possession. If a warranty be to one and his heirs, without the word, "assigns," the assignee indeed cannot vouch, but he may (*a*) rebut; for rebutter is so incident to a warranty, that a condition not to rebut is void in law: but it is otherwise of a condition not to vouch, for in such case you may rebut. It is true, it hath been an opinion, that he who claimeth above the warranty, if it be not attached, cannot take benefit of it by way of *voucher* or *rebutter*: as if tenant in dower make a feoffment to a villain with warranty, and the lord enter upon him before the descent of the warranty, the villain can never take advantage of this warranty by way of rebutter, because the lord's title is paramount the warranty, and he comes not under his estate to whom the warranty was made. If land be given to two brothers in fee, with warranty to the eldest and his heirs, and the eldest dies without issue, the survivor shall not take benefit by this warranty for the reason aforesaid. But in the case at bar, the warranty being collateral and annexed to the land, goes with the estate, and whilst that continues, the party may vouch or rebut: so here the defendant, though he be only tenant at will, for the estate is in the bargainors, and their heirs, there being no execution of it either by livery or enrollment, yet he may rebut.

*ATKINS, *Justice*, was of the same opinion, that by this collateral warranty the entry of the lessor of the plaintiff was taken away, for it is the nature of a collateral warranty to be a bar; a (*b*) right is bound by it; it extinguishes a right; it is annexed to the land, and runs with it. If then a collateral warranty be of this nature, it

WILLIAMSON *against* HANCOCK.

1. Mod. 181.

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(*a*) Co. Lit. 265. a. 384.

*[16]

(*b*) Jones Rep. 199, 200. Co. Lit. 366. 385. 2. Hen. 6. 63. Bro. "Gar." 4.

WILLIAMSON *against* HANCOCK.

it is against all reason, that he who is thus bound should make any title to the land; but it is very reasonable, that he who comes in *quasi* by that estate should defend his title. The opinions of JONES, *Justice*, and CROKE, *Justice*, in the case of *Spirt v. Bence* (*a*) have occasioned this doubt: The case was shortly thus: *Cann* being seised in fee had three sons, *Thomas*, *Francis*, and *Henry*, and devised lands to the two eldest in tail, and to *Henry* the meadow called *Warbay* (which was the land in question), but doth not limit what estate he should have in it; then he adds these words, *viz.* "ALSO I will that he shall enjoy all bargains I had of "*Webb* to him and his heirs, and for want of heirs of his body (*a*), "to his son *Francis*, and that *Margaret* should have it for life." *Cann* dies; the meadow was not one of *Webb's* bargains; *Thomas* had issue *Thomas* the lessor of the plaintiff; *Henry* made a feoffment in fee to *A.* and *B.* to the use of himself and his wife, and to the heirs of their two bodies, remainder to his own right heirs, with warranty against all persons, and died without issue; the lessor of the plaintiff enters, being his cousin and heir, and of full age when *Henry* died. In this case it was held, that if it had been found that *Margaret* had an estate for life, and that *Henry* entered in her life-time, that it had been then *a warranty* commenced by disseisin, and would not have bound *Thomas* the reversioner. But as it was, those two Judges held it no bar, because the warranty began with the feoffment to uses, and *Henry* being himself the feoffee, it returned instantly to him, and was extinct as to the reversion, because that was re-vested in him in fee; and therefore they held, he could have no benefit either by *voucher* or *rebutter*, it being destroyed at the same time it was created.—But BERKLEY and RICHARDSON, *Justices*, held, that *quoad* the estate of *Henry's* wife the warranty had a continuance; and the ground of the contrary opinion might be, because JONES, *Justice*, said there was no such resolution as is mentioned to be the fourth in *Lincoln College Case*; yet he affirmeth that very resolution in his own Reports.

(*a*) Cro. Car. 368

[17] * There is a clause in the statute of Uses, the 27. *Hen.* 8. c. 10. difficult to be understood, by which it is enacted, "That "every *cestuy que use* may take such advantage of vouching, &c. "as the feoffees themselves might, so that *cestuy que use* have the "estate executed in him before the first day of *May* 1536," which was a year after the making that statute: so that the clause seems to be exclusive of all others who shall come in afterwards. But he supposed, the intention of the law-makers to be, that there should be no more conveyances to uses: but because they presumed, that at first men might not know of it, therefore, lest the parties should be any ways prejudiced, they gave liberty till such a time to *vouch* or *rebut*, within which time they might have

(*a*) Notwithstanding the word "*body*" he had but an estate for life in *Warbay*; for that word extends to no other than *Webb's* bargains.—*Note to the* FOURTH EDITION.

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some knowledge of the statute, and then it was supposed they would make no more limitations to uses. But though they imagined them to be left expiring, yet they revived. Since, then, the parliament gave leave to *vouch* or *rebut* whilst they could in reason think there would be any conveyance to uses, it is but reasonable, whilst they do continue, that the parties should *rebut*, especially since most conveyances at this day are made to uses. WILLIAMS against HANCOCK.

WYNDHAM, *Justice*, *accord. in omnibus*; and so judgment was given as aforesaid (*a*).

(*a*) By 4. *Ann.* c. 16. s. 21. "All "*warranties* made by any tenant for "life, of any lands, tenements, or here-"ditaments, the same descending or "coming to any person in remainder or "reversion, shall be void and of none "effect: AND all *collateral warranties* "of any lands, tenements, or heredita-"ments, by any ancestor who has no "estate of inheritance in the same, "shall be void against his heir."—See Mr. Butler's note (2). Co. Lit. 373. b. 2. Bl. Com. 303. 1. Mod. 193. note (*a*). 3. Com. Dig. title, "Garranty."

Anonymous. Case 9.

In dower, the tenant may plead, that the husband of the demandant made a lease, still existing, of the estate, before any title to dower accrued, and conveyed the reversion; but if it appear to be an old mortgage long since satisfied, it shall not bar the right of the demandant.

DOWER. The tenant pleads, That a lease was made by the husband for ninety-nine years, before any title of dower did accrue, which lease was yet in being; and shews, that the lessor afterwards granted the reversion to *J. S.* and died, and that *J. S.* devised to the tenant for life. The demandant replies, That the lessor made a feoffment in fee, ABSQUE HOC, that the reversion was granted *prout*, *&c.* The tenant demurs.

NEWDIGATE, *Serjeant*, for the demandant, argued, That the plea was not good; to which he took several exceptions.

FIRST EXCEPTION. The tenant by his plea confesseth, That the demandant ought to have judgment of the *reversion expectant* upon the lease for ninety-nine years, *de tertiâ*, but doth not say, *parte*.

SECOND EXCEPTION. * Here is the grant of a reversion pleaded, and it is not *hìc in curiâ prolatâ*. *[18]

THIRDLY, Then for the matter, as it is pleaded, it is not good. He agreed, if dower be brought against lessee for years, he may discharge himself, by pleading the continuance of his lease, during which time the demandant can have no execution; but here the tenant is no ways concerned in the lease; it is *Littleton's Case*. None shall take advantage of a release, but he who is *party* or *privy*; and therefore the lessee, in this case, being party, might have pleaded this, but the tenant is altogether a stranger. Before the statute of *Gloucester*, cap. 11. if the demandant had recovered, in a real action against the tenant, the termor had been bound; because, at the common law, nobody could falsify the recovery of a freehold, but he who had a freehold himself: this statute prevents that mischief, and enacts, "That the termor shall be received be-"fore

Bro. "Leases," 26. Fitz. N. B. 198. 220. Vaugh. 127. 4. Co. 80. 3. Bac. Abr. 297.

ANONYMOUS. "fore judgment, to defend the right of his term, upon the default of the tenant;" and though the judgment cannot be hindered thereby, yet execution shall be suspended during the term. And therefore in *Dyer*, 263. b. the *Lady Arundel* brought dower against the *Earl of Pembroke*, who made default; and before judgment the termor prays to be received upon this statute, and pleads a lease made by the husband after coverture, which was assigned to him, and that dower *de tertiâ parte* of the rent of this lease was assigned to the demandant, by the court of augmentations, which was afterwards confirmed by letters patents; that she accepted it; and concludes, That the plea of the tenant was by collusion between him and her, to make him lose his term. And this was held ill, for the reason given by LORD HOBART, That it is absurd to admit two persons to dispute the interest of a third man (*a*). But whether *the traverse* is good or not, if *the plea* is naught, judgment ought to be given for the demandant.

10. Mod. 323. 12. Mod. 91. Ld. Ray. 296. 692. Stra. 674.

JONES, *Serjeant*, *contra*. The pleading is well enough.—FIRST, The tenant confesseth, That the demandant ought to have judgment of the reversion *de tertiâ*; which is well enough, omitting the word "*parte*," because he claims a third part of such tenements; and the tenant confesses she ought to have judgment; which is full enough, if the words *de tertiâ parte* were wholly omitted.—SECONDLY, He agreed, That whoever claims under a deed, must shew it; but the tenant, in this case, did not defend [19] himself * by any title from the deed; for the substance of the plea which secured him was, That a lease of ninety-nine years was in being, and by his alledging the devise of an estate to him for life, made by the grantee of the reversion, he did but allow the demandant's writ to be true, which mentions him as tenant of the freehold. THIRDLY, Then for the matter of the plea, he says it was good, and that the tenant might well plead the lease for years. 3. Inst. 32. b. By the statute of *Merton*, damages are given in dower where the husband died seised, which he did in this case; but yet no damages ought to be paid here, but for the third part of the rent, and the third part of the reversion; and therefore to acquit himself thereof, he may well plead, as here, for which there is a precedent in *Hern's Pleader*, 335. THEN he said, That the traverse was ill, for the principal point in the plea which he ought to have traversed was the continuance of the term; and it is not material who granted the reversion, or to whom it was granted; for if there is a lease in being, the demandant cannot have execution.

THE COURT were all of opinion, That the substance of the plea was good, because there was a privity in the grantee, and it was for his benefit to avoid the demandant's seisin, he being thereby entitled to the rent; and he may plead this plea to save himself

(*a*) Hob. 316. Not for that reason, but because that court could not assign dower; and so the letters patents of confirmation could not make that good which was void before.—*Note to* FOURTH EDITION.

from

from damages given by the statute of *Merton*: But as to the traverse, ANONYMOUS.

NORTH, *Chief Justice*, and WYNDHAM, *Justice*, inclined, That *the traverse* was well taken; for if a disseisor plead the like plea, as here, it is not good; and therefore when the tenant alledges a grant of the reversion, the demandant may well traverse it.

But ELLIS and ATKYNS, *Justices*, were of opinion, That the traverse was immaterial, for it was *the lease* and not *the grant* that was traversable. Ld. Raym. 41.

But because it was alledged by the demandants (who offered to refer it to the counsel on the other side), that this lease so pleaded was an old mortgage long since satisfied, it was referred accordingly. 1. Term Rep. 759.

* [20]

* Wilson *against* Drake.

Case 10.

If a *feme sole* have debts due by specialty, and she marries, and dies, the husband shall have administration.

Quære, Whether he *shall* make distribution to her kindred?

Cas. Temp. Talb. 168. 173. Ld. Ray. 685. 2. Peer. Wms. 497. 3. Peer. Wms. 199. 1. Vern. 88. 161. 170. 356. 2. Vern. 61. 118. 302. 401. Prec. Ch. 63. 10. Mod. 33. 163. 246. Gilb. Eq. Rep. 70. 98. 103. 140. Fitzg. 149. 203. 303. Stra. 891. 1111. 1118. 1. Com. Dig. "Administra-"tion" (H).

A PROHIBITION being granted upon the late statute of 22. & 23. *Car.* 2. c. 10. for disposing of intestates estates, the defendant demurred.

The question was, Whether the husband being administrator of the wife's estate be compellable to make distribution amongst her kindred or not?

The circumstances of the case were: A *feme sole* had divers debts owing to her by specialty; she marries the plaintiff, and died (the bonds being not put in suit during the coverture); the plaintiff administers, and her brother sues to have a distribution.

SEYS, *for the defendant*, insisted, that *a consultation* ought to go, because the statute 22. & 23. *Car.* 2. c. 10. extendeth to all persons; and therefore the husband, though not named, shall make distribution (*a*); like the statute *de donis*, which only mentions some estates tail; but it has been held, that there are several other estates tail besides those particular instances there mentioned. The title of this act is general, and there is no preamble to reduce it to particulars; the enacting and provisional clauses speak in three places of "all persons dying intestate," within which general words a *feme covert*, as well as others, is contained.

But JONES, *Serjeant*, on the other side, said, that this case is not instanced in that act, which provides only where the husband dies intestate. As to what was objected, that this act is a general provision, and extends to all cases of the like nature, the title of it also being general, "For settling of Intestates Estates;" it was said, that before the making this act there were many doubts in

(*a*) But by the 29. *Car.* 2. c. 3. s. 25. it is declared, that neither the 22. & 23. *Car.* 2. c. 10. nor any thing therein contained, shall be construed to extend to the estates of *femes covert* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said act. 1. Mod. 231.

WILSON *against* DRAKE.

those cases against which a provision was thereby made, and therefore it well became the prudence of that parliament to take away all scruples, and to settle those things which were so apt to be questioned: but no doubt was ever made before this statute to whom administration of the wife's estate should be committed; for by the statute 31. *Edw.* 3. c. 11. power was given to the ordinary to commit administration to * *the best friend* of the intestate; and therefore it has been agreed that the *(a)* husband, as being the best friend of the wife, was intitled to the *(b)* administration. And it is agreed on all sides, that no distribution is to be made by an administrator; for if any suit had been commenced in the spiritual court to that purpose, a prohibition was presently granted. What need was there to settle this matter by act of parliament, which was so clear before? And it is the more unlikely that the estates of *feme coverts* should be intended to be disposed by this act, when it is considered that all their estates consist only in things in action, which the husband might release during the coverture (for all the goods in possession are by law vested in the husband by the intermarriage); and therefore such inconsiderable things may be well intended not worthy the care and provision of a parliament. Besides, the husband and wife are but one person in law, and this act provides "for the settling *intestates* estates:" now the wife cannot be said to die intestate, when her husband (the better part) survives. Before the making those acts of 31. *Edw.* 3. c. 11. and 21. *Hen.* 8. c. 5. the ordinary might have granted administration to a stranger; but now by the first of those laws he is restrained to *the next friend*, and by the other to *the widow* or *next of kin*; so that the power which he had at the common law, and which was too often by him abused, being now restrained, administration must be granted as prescribed by this law, and no equitable construction can take it from the husband; for how can it be intended that the parliament would take from him that right which he had by those former laws, and prefer the relations of his wife before him? But if the wife shall be adjudged an intestate within this act, then the husband must lose all her estate in action, and he will be then also within the rules of distribution; so that he must be at all the labour and pains of administration (which must be granted to him) to defend and get in the estate, and receive no benefit; for he must only deduct his expences out of the profits, and distribute the overplus. He is intitled to the administration within the statute of 31. *Edw.* 3. c. 11. He is also intitled to it within the clause of the statute of 21. *Hen.* 8. c. 5. which enacts, "That it is to be granted to *the wife* or *next* "*of kin*;" and it seems very unreasonable that he should have no profit for his labour. * Lastly, A *feme covert* can never be intended to die intestate within the meaning of this act; for that clause which directs what bond the ordinary shall take of the administrator, is very remarkable to this purpose: it provides, "that if "it appear the deceased made any will, &c." which a *feme covert* cannot do without her husband's consent, and therefore she is not a person dying intestate within the intent of this law.

CURIA *advisare vult.*

*[21]

*[22]

(a) 4. Co. 51. Ognel's Case. Cro. Car. 106. Johns *v.* Row.

(b) *Quære*; for administration is not granted to the husband *de jure*; the ordinary may grant it to whom he please.

See the Archbishop of Canterbury *v.* Howse, Cowp. 140.

EASTER TERM,

The Twenty-Seventh of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*
Sir Hugh Wyndham, *Knt.*
Sir Robert Atkyns, *Knt.* *Justices.*
Sir William Ellis, *Knt.*
Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Naylor *against* Sharplefs and Others, Coroners of Lancafhire. Cafe 11.

AN ACTION ON THE CASE was brought for a *falfe return*, in which the plaintiff fets forth, That upon a writ iffuing out of this court to the chancellor of the duchy of *Lancafter*, procefs was directed to *fix coroners*, being the defendants, which was delivered to *one* of them, being then in the prefence of the party who was to be arrefted, but he did not execute it; and afterwards, at the return of the writ, they all returned, *non eft inventus*. This action was laid in *Middlefex*, and upon not guilty pleaded, the caufe came to trial, and there was a verdict for the plaintiff.

In an action for the falfe return of a writ iffued out of the king's bench to the chancellor of the duchy of *Lancafter*, the *venue* may be laid either in *Middlefex* or in *Lancafhire*.

BALDWIN, *Serjeant*, moved in arreft of judgment—FIRST, That the action ought not to be laid in *Middlefex*, but in *Lancafhire*, where *the tort* was committed.

But it was anfwered by TURNER, *Serjeant*, that when two matters, both of which are material, are laid in two counties, the action may be brought in either; as if two libel in the admiralty for a contract made at land in *Dorfetfhire*, and for which the plaintiff brings an action in *London* againft one of them, it has been adjudged the action lies in either county.

S. C. 1. Mod. 37. 198. 2. Lev. 122. 1. Show. 344. 5. Mod. 405. 1. Saund. 246. Ld. Ray. 105. 331. 12. Mod. 7. 408. 515. Stra. 727. 2. Bl. Rep. 1071. 1. Com. Dig. "Amendment" (H 3).

 SECOND

NAYLOR *against* SHARPLESS.

SECOND EXCEPTION. The action will not lie against the six coroners, for *the tort* was done by one alone.

* [24]

As to that it was said, that all the coroners are but one officer; so if one sheriff suffer an escape, both are liable; but in this case it had been ill to have brought the action only against one, because * the ground of it is the false return, which was made by six coroners.

If the chancellor of the duchy of *Lancaster* direct process to the *six coroners*, and they return *non est inventus*, when *one* of them might have taken the person named in the writ, an action will lie against them *all*; for they make but one officer.—S. C. 1. Mod. 37. 198. 5. Co. 89. 11. Co. 2. 3. Lev. 399. Carth. 145. Cro. Eliz. 625. 8. Mod. 303. 1. Show. 289. 1. Com. Dig. "Action" (N 11). Cowp. 195. 2. Term Rep. 282.

A *mis-trial* is not aided, unless the *venue* is laid in the proper county.

3. Lev. 394. 1. Vent. 22. 12. Mod. 7. Ld. Ray. 106. 330. 1214.

And as to THE FIRST EXCEPTION, there could be no doubt now, since after verdict it is helped by the statute of 16. & 17. *Car.* 2. c. 8. though the trial be in a wrong county.

But THE COURT said, that statute helps *a mis-trial* in the proper county, but not where the county is mistaken; and inclined likewise that this action was well brought against the six for this *tort* committed by one coroner: but if it had been for not arresting the party, in such a case it ought to have been brought against the coroner who was present with the person to be arrested; for that had been a *personal tort*, which could not have been charged upon the rest.

Case 12.

Edwards *against* Roberts.

On a promise to pay in consideration of forbearance, an averment that he did *extunc totaliter abstinere, &c.* without saying *hucusque*, is good after verdict.

2. Roll. Abr. 470. Raym. 203. Cro. Jac. 404. Yelv. 17. Hard. 5. Stiles, 295. 303.

THE plaintiff declares, that the defendant promised to pay him so much money, in consideration that he would forbear to sue him; and then he avers, that he did *extunc totaliter abstinere, &c.* Upon *non assumpsit* pleaded, a verdict was found for the plaintiff.

TURNER, *Serjeant*, now moved in arrest of judgment—FIRST, The consideration intends a *total forbearance*, and the averment is, that from the making of the promise he did totally forbear, but doth not say *hucusque*.

Sed non allocatur; for that shall be intended. And it was the opinion of THE WHOLE COURT, that if the consideration be (as in this case) wholly to forbear, the plaintiff by an averment, that from the making the promise *hucusque* he did forbear, is well entitled to an action. A like case was this Term, where the consideration was as before; and the averment was, that he forbore seven months; and being moved in arrest of judgment by BALDWIN, *Serjeant*, because it is not said *hucusque*, which implies that after the seven months he did not forbear, it was notwithstanding held good, it being a reasonable time; and the rather, because if the action had been brought within the seven months, and the plaintiff had averred that *hucusque* he forbore, it had been good enough. QUÆRE.

Reed

* Reed *against* Hatton. Case 13.

IN A SPECIAL VERDICT in ejectment the question arose upon the construction of the words in a will; the case being this: A devise of houses "to my "son *Robert*, upon condition that he *pay* unto his two sisters five pounds a-year," gives him an estate *in fee*.

John Thatcher was seised in fee of the houses in question, and devised them to his son *Robert*; in which will there was this clause, VIZ. "*Which houses I give to my son* ROBERT *upon* "*this condition, that he pay unto his two sisters five pounds a-*"*year*; the first payment to begin at the first of the four most "usual Feasts that shall next happen after the death of the testator, "so as the said Feast be a month after his death, with a clause of "entry for non-payment." The testator dies: the houses are worth sixteen pounds a-year.

1. Roll. Abr. 834. 6. Co. 16. Cro. Eliz. 204. Cro. Car. 157. 2. Vern. 106. 1. And. 38. Cro. Jac. 378. 527. 591. 599. 2. Roll. Rep. 80. Dyer, 371. Pollex. 399. 11. Mod. 208. Prec. Chan. 27. 37. 68. Abr. Eq. 177. 2. Show. 49. 3. Com. Dig. "Devise" (N 4). 2. Bac. Abr. 54. 3. Burr. 1535. 1542. 1. Bl. Rep. 537. Cowp. 352. 835. 3. Term Rep. 356.

And, Whether *Robert* the son shall have an estate *for life* only, or an estate *in fee*? was the question.

JONES, *Serjeant*, *for the plaintiff*, said, that *Robert* had but an estate for life. It is true, in most cases the word "paying" makes a fee, where there is no express fee limited; but the difference is, *viz.* Where the money to be paid is a sum in gross, let it be equivalent or not to the value of the thing devised, the devisee shall have a fee, though the estate be not devised to him and his heirs; but if it be an annual payment out of the thing devised, as in this case, it will not create a fee without apt words, because the devisee hath no loss; and therefore it hath been held, that if a devise be made to two sons, to the intent that they shall bear equal share towards the payment of forty pounds to his wife for life, the sons had only an estate for life, because it is *quasi* an annual rent out of the profits, and no sum in gross: *Cro. Car.* 157. *Broke Abr. tit.* "*Estate*," 78. *Jones* 211. And *Collier's Case*, 8. *Co.* 18. was much relied on, where this very difference was taken; and allowed that paying twenty-five pounds *in gross* makes a fee, but paying fifty shillings *per annum* creates only an estate for life. All devises are intended for the benefit of the devisee, and therefore where a sum in gross is devised to be paid, which is done accordingly, in such case if the devisee should die soon after, the money would be lost, if he should have only an estate for life; but in the case at bar the testator, by a nice calculation, had appointed when the first payment should be made, *viz.* * "not until a month after his de-"cease," which hath prevented that damage which otherwise might have happened to the devisee, if no such provision had been made. *Vide Hob.* 65. *Green's Case*. *[26]

SEYS, *Serjeant*, *for the defendant*, said, that *Robert* had a fee; for though here is a sum to be paid *annually*, it is a sum *in gross*; and *Collier's Case* was also relied upon on this side. It was agreed, where payment is to be made by which the devisee can sustain no loss, the word "paying" there will not make a fee; but if there be any possibility of a loss, there it will create a fee, which is the express resolution in *Collier's Case*. Here the five pounds is payable quarterly, and the first payment is to be made the next quar-

Moor, 852. Cro. Jac. 415. Bridg. 84. 3. Bulst. 193. T. Jones, 106. 3. Bac. Abr. 23. 4. Bac. Abr. 321, 322.

REED *against* HATTON.

ter after the death of the testator, so as it be a month after his decease: if then he should die a month before *Christmas*, the devisee is to pay the whole quarterly payment at *Christmas*: so that if he should die the next day after, instead of having any benefit, he would lose by this devise, in case it should be construed that he had an estate only for life.

THE COURT were of opinion, that a legacy or devise is always intended for the benefit of the party; so that it is reasonable to make such construction of the will, that he may have no possibility of a loss. And it hath been resolved, where a devise was to *A.* upon condition to pay a sum of money to *B.* and in case of failure that *B.* may enter, it is no condition but an executory devise, and that *Mary Portington's Case* (*a*) was denied to be law in the resolution of *Fry v. Porter*, in the king's bench (*b*). And afterwards in this Term judgment was given for the defendant. For if there be a devise to one upon condition to pay a sum of money, if there be a possibility of a loss, though not very probable, that the devisee may be damnified, it shall be construed a fee, and such construction hath been always allowed in wills. If *A.* devise one hundred pounds a-year to *B.* paying twenty shillings, it is not likely that the devisee should be damnified, but it is possible he may; and therefore the estate in this case being limited to *Robert*, and charged with payments to the sisters during their lives, doth plainly prove that the intent of the testator was, that the devisee should have an estate in fee simple. And judgment was given accordingly.

(*a*) 10. Co. 36.
(*b*) 1. Mod. 87.

*[27]

Case 14.

* Bridges *against* Bedingfield.

Exceptions to debt upon an arbitration bond.
Carth. 378.
3. Mod. 331.
Ld. Ray. 123. 247.
Stra. 116.
Cases Temp. Finch, 384.

DEBT was brought upon a bond of award, and the breach assigned was for not delivering of quiet possession to the plaintiff of seats in a church. The defendant craves *oyer* of the bond and condition, which was for performance of an award to be made *de præmissis vel aliquâ parte inde*; and if there should be no award made, then for the performance of an umpirage: AND PLEADS, that the arbitrators made no award *de præmissis*, but the umpire awarded that the plaintiff should *abinde* upon all occasions hold two seats quietly and peaceably in such a church, without any disturbance made by the defendant; and that on the first day of *November* following the defendant should deliver up the seats to the plaintiff, and that each should bear his own charge: and by his plea he farther sets forth, that the plaintiff enjoyed the seats *prout* till the thirtieth day of *October* next following, on which day the seats were pulled down without his knowledge or consent, *per quod* he could not deliver them to the plaintiff on the said first day of *November*. The plaintiff demurred.

JONES, *Serjeant*, maintained the demurrer; and said, that the pleading of *nullum fecerunt arbitrium* is not good; for it is said, *de præmissis* only, whereas it should have been *nec de aliquâ parte*

Qu. In debt on bond to perform the award of two persons, if the plea of "no award made" be good?

inde:

inde: for if a bond be to perform an award of two persons, or either of them, it will not be sufficient to plead that those two persons made no award, without adding *nec eorum aliquis*. But if an award be to be made of the manors of *Dale* and *Sale*, or either of them, and the award is made only of *Dale*, it is well enough. BRIDGES *against* BEDINGFIELD.

SECOND EXCEPTION. The umpirage is, that the plaintiff should hold the seats *abinde*, which is for ever; and the defendant pleads, that the plaintiff enjoyed them till the thirtieth day of *October*. Repugnancy in pleading.

THIRD EXCEPTION. The seats were to be delivered to the plaintiff on the first day of *November*, and the defendant pleads, that they were pulled down before that day without his privity; which is not a good plea by way of excuse; for being bound to deliver the seats, he is to prevent what may hinder the performance of the condition. * It is agreed, that if a thing be possible, and afterwards by the act of God becomes impossible to be done, that will be a good excuse (*a*); as if I promise to deliver a horse at such a day, and he dies before the day, I am excused, 21. *Edw.* 4. *pl.* 70. b. So if a *scire facias* be brought against the bail, and they plead that before the writ brought the principal was dead, this was held not good upon demurrer, unless he is alledged to be dead before the *capias* awarded against him, *Cro. Jac.* 97. But if the action of a stranger interpose, which makes the thing impossible, that is no excuse, 22. *Edw.* 4. *pl.* 27. and therefore it is no plea for the bail to say, that the principal was arrested at another man's suit and had to prison, for which reason he could not render him, *Cro. Eliz.* 815. So if I deliver goods to the defendant, and in action of *detinue* brought, he pleads they were stole, it is no good plea, because the delivery charges him at his peril, unless he undertake to keep them as his own, *Southcot's Case* (*b*). So if an escape be brought against a gaoler, he is not excused by alledging that traitors broke the prison, 1. *Roll. Abr.* 808. *Et sic de similibus.*

Qu. If a covenant to deliver seats in a church on such a day, be discharged by the seats being pulled down before the day?

*[28]

1. Roll. Abr. 336. Jones, 29. Moor, 432. Stiles, 324. 4. Bac. Abr. 420, 421. Post. 308.

SEYS, *Serjeant, for the defendant*. As to THE FIRST EXCEPTION, *Nullum fecerunt arbitrium de præmissis* is well enough; for that implies *nec de aliqua inde parte*, especially if the contrary is not shewn in the replication; and therefore it shall never be intended that an award was made of some part.—SECONDLY, It is said, he enjoyed the seats till the thirtieth of *October*, and then they were taken down, so not being *in rerum natura* they could not be enjoyed longer.—THIRDLY, And this is a good excuse for not delivering them to the plaintiff on the first day of *November*, and so a good performance of the award, *Co. Lit.* 206. b. If *A.* be bound to *B.* that *C.* shall marry *Jane* such a day, and *B.* the obligee doth marry her himself before that day, the obligor is excused; because by his means the condition could not be performed (*c*). There is a difference taken where a man is bound to deliver things which are in his custody, and other things which are

(*a*) See Wynne's Case, Jones, 179.
(*b*) Cro. Eliz. 815.
(*c*) See Basket *v.* Basket, post. 200.

BRIDGES *against* BEDINGFIELD.

not in his possession: as in the first case, to deliver my horse or dog, for such I may secure in my stable from casualties: but in this case it is expresly said in the award, that the property of the seats was in the plaintiff, and that they were fixed in the church, so that he could not possibly secure them in his own house without subjecting himself to an * action; and an award that one man shall take the goods of another, is void. But if the plea is not good, yet if the umpirage be naught, judgment is to be given for the defendant, for the advantage is saved to him upon the demurrer. And as to that, the umpirage is but of one side, for the plaintiff is to do nothing, nor is the defendant to be acquitted of all suits.

* [29]

JONES, *Serjeant*, *for the plaintiff*, replied, that the umpirage was of both sides; for there being suits depending, it is awarded, that each shall bear his own charges, which is a benefit to the defendant; for otherwise (seeing the right was in the plaintiff) the defendant should have paid the plaintiff's costs as well as his own, for which he cannot now sue without forfeiting his bond.

CURIA *advisare vult*.

Case 15.

Squibb *against* Hole.

In debt in an inferior court, on a bond stated to be made *within the jurisdiction*, to which the defendant pleads *non est factum*, if judgment be given against him, and he is taken in execution, and an action be brought for an *escape*, in which it is found, by special verdict that the bond was not made *within the jurisdiction*, the action will not lie.

THE PLAINTIFF brought an action of escape, and declares, That he prosecuted one *J. S.* in the court of *Ely*, upon a bond made *infra jurisdictionem* of that court, upon which he was taken, and the defendant suffered him to escape. Upon not guilty pleaded, the jury found a special verdict to this effect, *viz.* That there was such a bond, upon which there was such a prosecution, and such an escape as in the declaration; but they find farther, that this bond was not made *infra jurisdictionem curiæ*.

MAYNARD, *Serjeant*, who argued for the plaintiff, said, that this action was commenced in an inferior court, upon a bond which the plaintiff sets forth to be *infra jurisdictionem curiæ*; and that the defendant was arrested and suffered to escape; and, Whether (if in truth the bond was not made *infra jurisdictionem*) an action of escape would lie, or whether all the proceedings are *coram non judice?* was the doubt. He took a difference, where an inferior court hath an original jurisdiction of the cause, and hath conusance of such a suit as is brought there; for in such cases the proceedings are not extra-judicial; but if an action be brought where properly no action doth lie, all the proceedings there are *coram non judice*. * At the common law, one who had a particular jurisdiction to hold pleas within a liberty, could not hold any plea of a thing which did arise out of the liberty; for though it was transitory in its nature, yet being alledged not within his jurisdiction, it was ill, 2. *Inst.* 231. But when the cause of action arises *infra jurisdic-*

* [30]

S. C. 1. Freem. 193. 1. Saund. 73

Comyns, 153. 574. 6. Mod. 223. 9. Mod. 95. 10. Mod. 71. 11. Mod. 7. 50. Stra. 827. Ld Ray. 131 2. Hawk. c. 19. s. 24. Salk. 404. 2. Wils. 16. Cowp. 18.; and see the case of Nevor v. all, 1. Term Rep. 151.



tionem, that gives them authority to proceed; and therefore it would be hard that the Judge and officer should be punished by a construction to make all extra-judicial, when they have no possible way of finding, whether in truth the cause did arise within the jurisdiction of the court or not *(a)*: but the officer is bound to obey the process of the court, if it appear (as in this case) that they had conusance of it. The Judge is likewise bound to grant the process, otherwise he is subject to the plaintiff's action for his refusal. In some cases, the plaintiff himself may not know where the bond was made; as if he be executor of the obligee, &c. Besides, in this case it is set forth, That in the action below, the defendant pleaded *non est factum*, and so had admitted the jurisdiction, or at least had waived it; and it would be an insufferable mischief, if after all this labour and charge the defendant might avoid all again.

SQUIRE against HOLE.

(a) See the case of Crowder v. Goodwin, post. 58.

North, *Chief Justice*, said, That if this cause had been tried before him, he would have non-suited the plaintiff, because he had not proved the truth of what he laid down in his declaration, *viz.* That the bond was made *infra jurisdictionem curiæ*. But as to the matter as it stood upon the special verdict, he inclined, that as to the plaintiff (who knew where the bond was made) all the proceedings were *coram non judice*; but as to the officer it was otherwise, for the *pleint* and *process* would be a good excuse for him, in an action of false imprisonment.

See the case of Rowland v. Veal, Cowp. 18. and Trevor v. Wall, 1. Term Rep. 151.

And afterwards, by the opinion of three Judges, *viz.* The Chief Justice, and Wyndham and Atkins, *Justices*, judgment was given for the defendant, That this was no escape, and that though the party had admitted the jurisdiction, by his plea of *non est factum* below, yet that could not give the Court any jurisdiction, when they had not any originally in the cause; and the case of *Richardson v. Bernard (b)*, was cited as an authority in point, where the plaintiff in an action brought against an officer, declared in *Hull*, upon a bond made at *Hallifax*, and had judgment * and execution, and the defendant escaped; and in an action brought for this escape, the declaration was held ill, because it did not alledge the bond to be made *infra jurisdictionem curiæ*.

(b) Roll. Abr. tit. "Escape," 809. pl. 45.

* [31]

Ellis, *Justice*, of a contrary opinion *in omnibus*.

Sams *against* Dangerfield. Case 16.

The plaintiff, being collector of *the hearth-money*, brought an action of debt upon a bond against his sub-collector, conditioned to pay such sums as he should receive (within fourteen days.

In debt on bond to pay such sums as he should receive at a certain place, if the defendant plead "payment," and the plaintiff rejoins "non-payment of such a sum received at the place appointed;" a rejoinder that the plaintiff appointed no place, is *a departure* from the plea.—Co. Lit. 303. Cro. Car. 76. 246. Cro. Eliz. 783. Skin. 345. 1. Saund. 117. Comyns, 553. 12. Mod. 54. 92. Ld. Ray. 30. 76. 234. 266. 861. 1449. Stra. 21. 422. 1. Salk. 22. 1. Wilf. 122. 4. Term Rep. 504.

SAMS *against* DANGERFIELD.

days after receipt) at such a place in the city of *Worcester* as the plaintiff should appoint. The defendant pleads "payment." The plaintiff assigns a breach, in non-payment of such a sum received at a place by him appointed. The defendant rejoins, that the plaintiff appointed no place; and the plaintiff demurred.

And after argument for the plaintiff by JONES, *Serjeant*, this was adjudged *a departure*, because the defendant ought to have pleaded first, That he had paid all but such a sum, for which, as yet, the plaintiff had appointed no place of payment.

And judgment was given accordingly.

Case 17. Smith *against* Hall.

If a defendant in custody upon *mesne process* tender a bail-bond, with sufficient sureties, to *the bailiff*, and *he* refuses it, an action *on the case* will lie against *the sheriff*; but *trespass* for the false imprisonment will not lie against the *officer*.

IN AN ACTION brought against the defendant for false imprisonment, he justified by virtue of *a latitat*; which the plaintiff agreed in his replication; but farther set forth, that after the arrest, and before the return of the writ, he tendered sufficient bail, which the defendant refused: and issue was joined upon *the tender*, which was found for the plaintiff.

NEWDIGATE, *Serjeant*, moved in arrest of judgment—FIRST, Though it was an offence in the defendant, who was the sheriff's bailiff, to refuse good bail when tendered, yet it is not an offence within the statute 23. *Hen.* 6. c. 10. because a sheriff's bailiff is not an officer intended in that statute; neither will this offence make him a trespasser *ab initio*, because * the taking was by lawful process, *Cro. Car.* 196, *Salmon v. Percival* (*a*). The defendant, as bailiff to the sheriff, is not the proper officer to take bail, but the sheriff himself must do it; and therefore an action on the case must lie against the bailiff, for not carrying the party before the sheriff, in order to put in bail; but an action of false imprisonment will not lie.

* [32]

Post. 84. 180. Cro. Eliz. 76. Cro. Car. 196. 1. Leon. 189. Gilb. C. P. 20. W. Jones, 226. 1. Sid. 22. 2. Vent. 96. 8. Mod. 283. 10. Mod. 288. 11. Mod. 201. 12. Mod. 249. 447. 527. 557. 579. 2. Barnes, 84. Stra. 479. Ld. Ray. 425. 722. Tidd's Practice, 105. 2. Bl. Rep. 1169. 1. H. Bl. Rep. 468. Cowp. 403. 2. Term Rep. 148. 712.

SECONDLY, The action is laid, "*quare vi et armis, &c. in ipsum* (the plaintiff) *insultum fecit et ipsum imprisonavit et ut prisonar. à tali loco ad talem locum adducebat et detinuit, contra consuetudinem Angliæ, et sine causâ rationabili, per spatium trium dierum.*" The defendant pleads, *quoad venire vi et armis necnon totam transgressionem, præter* the taking and detaining him three days, *non culp.*; and as to that he pleaded the *latitat*, warrant, and arrest, *ut supra*; but the verdict being only against the defendant upon the second issue, and nothing appearing to be done upon this, and entire damages given, it is for that reason ill.

NORTH, *Chief Justice*. If the writ and warrant were good, then the refusing bail is an offence within the statute of 23. *Hen.* 6. c. 10. And as it is an oppression, so it is an offence also at the common law; but an action on the case, and not of false impri-

(*a*) See 2. Roll. Abr. 561. pl. 9. Cowp. 476.

sonment,

fonment lieth against the officer; for it would be very unreasonable by the refusal of bail to make the arrest tortious *ab initio*. A special action on the case had therefore been the proper remedy against *the sheriff*, but not against *the officer*; for an escape will not lie against him, but it must be brought against the sheriff.

SMITH *against* HALL.

Kren *against* Kirby.

Case 18.

EJECTMENT. The lessor of the plaintiff claimed under a surrender made to him by *William Kirby*, who had an estate in the land after the decease of his father, but entered during his life, and thereby became *a disseisor*; and his estate being now turned into *a right*, he made the surrender to the lessor of the plaintiff; all which was found by special verdict at the trial.—And IT WAS ADJUDGED that the surrender was void.

If a copyholder in reversion enter upon the tenant for life, he is a *disseisor*, and a surrender by him is void.

S. C. 2. Danv. 205. Cro. Eliz. 662.

S. C. 1. Mod. 199. Post. 287. Moor, 597. 1. Leon. 95. 1. Roll. Abr. 500. 3. Leon. 239. 1. Bac. Abr. 473. 1. Term Rep. 600. 3. Term Rep. 365.

*[33]

* It was pretended at the trial, that the father, who was tenant for life, had suffered a common recovery in the lord's court, and so his estate was forfeited, for which the son might enter, and then his surrender is good.—But THE COURT answered, That without a particular custom for that purpose, the suffering a recovery would work no forfeiture of the estate; but if it did, it is the lord and none else who can enter.

A *common recovery* suffered in the manor court by a copyholder, is not a forfeiture of the estate; for unless there be a custom for it, nothing passes.

And so judgment was given for the defendant.

S. C. 1. Mod. 200. S. C. Lex Custum. 206. Post. 79. 229. 1. Roll. Abr. 508. 4. Co. 23. Moor, 753. Latch. 199. Co. Copyh. 163. 1. Bac. Abr. 484. 1. Term Rep. 738.

Duck *against* Vincent.

Case 19.

DEBT UPON BOND conditioned to perform covenants, one of which was for payment of so much money upon making such assurances.

On bond to pay so much, upon making such assurance; the plea *solvit ad diem*, must state the day on which it was made.

The defendant pleaded, That he paid the money such a day, but doth not mention when the assurance was made, that it might appear to the Court the money was immediately paid pursuant to the condition.

Comyns, 513. 11. Mod. 34. Ld. Ray. 597. 665. 1140. 5. Com. Dig. "Pleader"

And for that reason THE COURT were all of opinion that the plea was not good: and judgment was given for the plaintiff upon demurrer.

(2 W 29). 1. Bac. Abr. 550. 4. Bac. Abr. 93.

See 4. & 5. *Ann.* c. 16.

Case 20. Smith *against* Shelberry.

If *A.* agree to assign a lease to *B.* and *B.* agree to pay *proinde* such a sum of money, and there are mutual promises, it must be averred, in a declaration by *A.* to recover the money, that he assigned the lease.

S. C. 1. Freem. 195. Post. 75. Lut. 251. 2. Saund. 351. 2. Lev. 23. Comyns, 89. 98.

ASSUMPSIT. The plaintiff declared, That he was possessed of a term of eighty years; and it was agreed between him and the defendant, that he should assign all his interest therein to the defendant, who *proinde* should pay two hundred and fifty pounds; and that he promised, that in consideration that the plaintiff at his request had likewise promised to perform all on his part, that he would also perform all on his part; and then sets forth, that the defendant had paid *a guinea* in part of the said two hundred and fifty pounds, and that he, *viz.* the plaintiff, *obtulit se* to assign the premises by indenture to the defendant, which was written and sealed, and would have delivered it to him, but he refused; and assigns the breach in non-payment of the money: to which the defendant demurred.

BALDWIN, *Serjeant, for the defendant*, said, that this was not a good declaration, because the assignment ought to precede the payment; and that it was not a mutual promise, neither was the *obtulit se* well set forth; but this was *a condition precedent* on the plaintiff's side, without the performance whereof * no action would lie against the defendant (*a*), because it was apparent by the plaintiff's own shewing, that the money was not to be paid till the assignment made; for the plaintiff is to assign, and the defendant *proinde*, which is as much as to say *pro assignatione*, is to pay the money: like the case in *Dyer*, 76. a. *Assumpsit* against the defendant, that he promised *pro* twenty marks to deliver four hundred weight of wax to the plaintiff, the pronoun *pro* makes the contract conditional.

*[34]

Gilb. Eq. Rep. 252. 1. Peer. Wms. 284. 3. Peer. Wms. 65. 1. Vern. 83. 223. 2. Vern. 222. 478. 560. 721. Prec. Chan. 388. 8. Mod. 42. 10. Mod. 153. 223. 12. Mod. 214. Stra. 569. 616. Ld. Ray. 664. 1. Salk. 112. 171. See Gilbert's Law of Evid. 193.

But PEMBERTON, *Serjeant, for the plaintiff*, held the declaration good, and that it was a mutual promise, and that the plaintiff need not aver the performance; for in such cases each has remedy against the other; and it is as reasonable that the plaintiff should have his money before he make the assignment, as that the defendant should have the term assigned before he paid the money (*b*).

And of that opinion was THE COURT; only ATKINS, *Justice*, doubted.

ELLIS, *Justice*, cited a case adjudged in the king's bench which was, as he thought, very hard, *viz.* An assignment was made between *A.* and *B.* that *A.* should raise soldiers, and that *B.* should transport them beyond sea, and reciprocal promises were made for the performance (as in this case): That *A.* who never raised any soldiers may yet bring his action upon this promise against *B.* for not transporting them, which is a far stronger case than this at bar (*c*).

IT WAS AGREED here, that the tender and refusal (had it been well pleaded) would have amounted to, and have been equivalent with, a full performance; but the plaintiff hath not done as much

(*a*) See Ughtred's Case, 7. Co. 10.

(*b*) Hill *v.* Thorn, post. 309. Ld. Ray. 124. 664. 968.; but Lutw. 207. *contra.*

(*c*) Ware *v.* Chapple, Stiles, 186. See also 1. Lutw. 253.

as he might, for he should have delivered the indenture to the defendant's use, and then have tendered it. Smith *against* Shelberry.

But judgment was given for the plaintiff (*a*).

(*a*) But see the case of Thorpe *v.* Thorpe, 1. Salk. 171. where this resolution is denied to be law.

Hays *against* Bickerstaffe. Case 21.

A clause in a lease, that the lessee "paying "the rent and "performing "the covenants "on his part to "be performed "shall quietly "enjoy the premises," is not *a condition* but a *covenant*.

IN COVENANT brought by the lessee, who declared that the lessor covenanted with him, that he, "*paying* the rent and *performing* the covenants on his part to be performed," shall quietly enjoy. The breach assigned was a disturbance by the lessor, who pleads, that till such a time the plaintiff did quietly enjoy the thing demised without disturbance; but then he cut down wood, * which was contrary to his covenant, and then and not before he entered; and so by the plaintiff's not performing his covenant, the defendant's covenant ceases to oblige him: whereunto the plaintiff demurred.

The question was, Whether the defendant's covenant was conditional or not? for if it amount to *a condition*, then his entry is lawful; but if it be *a covenant*, it is otherwise, for then he ought to bring his action. *[35] S. C. Vaugh. 118. S. C. 1. Freem. 194.

PEMBERTON, *Serjeant*, *for the plaintiff*. That this covenant is not conditional, for the words "paying and performing" signify no more than that he shall enjoy, &c. under the rents and covenants, and it is a clause usually inserted in the covenant for quiet enjoyment: indeed the word "paying" in some cases may amount to a condition; but that is where without such construction the party could have no remedy. But here are express covenants in the lease, and a direct reservation of the rent, to which the party concerned may have recourse when he hath occasion. A liberty to take pot-water "paying so many turns, &c." is a condition. The words "paying and yielding" make no condition, nor was it ever known that for such words the lessor entered for non-payment of rent; and there is no difference between these words and the words "paying and performing;" in *Bennet's Case* in the king's bench it was ruled no condition: *Duncomb's Case*, *Owen Rep.* 54 (*a*). 2. Jones, 206. 1. Roll. Abr. 410. 1. Roll. Rep. 367. 2. Roll. Rep. 466. 4. Leon. 50. 1. Sid. 280. Owen, 54. 3. Leon. 33. Poph. S. Gilb. Evid. 195, 196. Ld. Ray. 666. T. Jones, 206.

(*a*) Cook *v.* Herle, post. 138. Vaugh. 32. 10. Mod. 154. Ld. Ray. 1242. 1419.

BARREL, *Serjeant*, *for the defendant*, said, that the covenant is to be taken as the parties have agreed; and the lessor is not to be sued if the lessee first commit the breach: *modus et conventio* qualify the general words concerning quiet enjoyment.

THE COURT took time to consider: and afterwards in this Term judgment was given for the plaintiff, that the covenant was not conditional. Sid. 266. 280.

ATKINS, *Justice*, doubted.

Simpson

Case 22.

* Simpson *against* Ellis.

A sheriff's bond shall be intended good, unless on *oyer*, it be shewn contrary to the 23. *Hen.* 6. c. 10.

10. Mod. 53. 85. 139. 12. Mod. 81. 310. 634. Stra. 922. 1. Term Rep. 418.

DEBT UPON A BOND by the plaintiff, who was chief bailiff of the liberty of *Pontefract* in *Yorkshire*; but he did not declare as *capital. ballivus*.

But yet by THE WHOLE COURT it was held good; for otherwise the defendant might have craved *oyer*, and have it entered *in hæc verba*, and then have pleaded (*a*) the statute of 23. *Hen.* 6. c. 10. that it was taken *colore officii* (*b*); but now it shall be intended good upon the demurrer to the declaration.

And ELLIS, *Justice*, said, that so it was lately resolved in this court in the case of one *Conquest*.—And judgment was given for the plaintiff.

(*a*) But this statute need not now be pleaded; for it is adjudged to be a public act. Samuel *v*. Evans, 2. Term Rep. 569.

(*b*) 1. Saund. 161. 1. Sid. 383. Latch. 143.

Case 23.

Mason *against* Stratton, Executor, &c.

If an executor plead two judgments, and no assets *ultra*, a replication that he only paid so much on each, and keeps both on foot *per fraudem*, is good.

1. Roll. Abr. 802. Sid. 333. Cro. Jac. 35. 102. 626. Vaugh. 105. Comyns, 20. 87. 1. Peer. Wms. 295. 1. Vern. 110. 369. 455. 474. 2. Vern. 62. 297. 325. 10. Mod. 498. 405. 12. Mod. 153. 201. 411. 496. 527. Cases Temp. Talb. 217. 226. Stra. 407. 732. Ld. Ray. 263. 678. 2. Bac. Abr. 434. 4. Bac. Abr. 120, 121.

DEBT UPON BOND. The defendant pleads two judgments had against his testator, and sets them forth, and that he had but forty shillings assets towards satisfaction. The plaintiff replies, that the defendant paid but so much upon the first judgment, and so much upon the second, and yet kept them both on foot *per fraudem et covinam*.

The defendant demurred specially, Because the replication is so complicated that no distinct issue can be taken upon it; for the plea sets forth the judgments severally, but the plaintiff puts them both together, when he alledges them to be kept *per fraudem*.

But on the other side it was said, that all the precedents are as in this case: 8. *Co. Turner's Case*, 132. 9. *Co. Meriel Tresham's Case*, 108.

And of that opinion was ALL THE COURT, that the replication was good: and judgment was given for the plaintiff.

Case 24.

Suffield *against* Baskervil.

If a bond contain only *a proviso*, and no express *covenant*, a breach cannot be assigned.

Cro. Jac. 281. 10. Mod. 227. Gilb. Eq. Rep. 43.

DEBT UPON A BOND for performance of all covenants, payments, &c. in an indenture of lease, wherein the defendant, for and in consideration of four hundred pounds lent him by the plaintiff, granted the land to him for ninety-nine years, if *G.* so long lived, provided if he pay sixty pounds *per annum* quarterly,

during

during the *life of G. or shall, within two years after his death, pay the said four hundred pounds to the plaintiff, then the indenture to be void, with a clause of re-entry for non-payment.—The defendant pleads performance.—The plaintiff assigns for breach, that thirty pounds for half-a-year was not paid at such a time during the life of G.

SUFFIELD *against* BASKERVIL.

The defendant demurs, For that the breach was not well assigned, because there is no covenant to pay the money; only by a clause, liberty is given to re-enter upon non-payment.

THE COURT inclined, that this action would not lie upon this bond, in which there was *a proviso* and no *express covenant*, and therefore no breach can be assigned.

Benson *against* Idle.

Case 25.

Estoppel not well pleaded with a traverse.

1. Mod. 201. Co. Lit. 352. Fitzg. 89. 130. Ld. Ray. 290. 1051. 1054. 4. Bac. Abr. 116.

AUDITA QUERELA. The case, upon demurrer, was, That, before the king's restoration, the now-defendant brought an action of *trespass* against the plaintiff for taking his cloth; who then pleaded, that he was a soldier, and compelled by his fellow-soldiers, who threatened to hang him as high as the bells in the belfry if he refused. To this the plaintiff then replied *de injuriâ suâ propriâ*, &c. and it was found for him, and an *elegit* was brought, and the now plaintiff's lands extended. Then comes the act of indemnity, 12. *Car.* 2. c. 11. which pardons all acts of hostility done in the times of rebellion, and from thenceforth discharges personal actions for or by reason of any *trespass* committed in the wars, and all judgments and executions thereon, before the first day of *May* 1658, but doth not restore the party to any sums of money, mesne profits, or goods taken away by virtue of such execution, or direct the party to give any account for the same; which act made by the Convention was confirmed by 13. *Car.* 2. c. 7. And upon these two acts of parliament the plaintiff (expressly averring in his writ that the former recovery against him was for an act of hostility) now brought this *audita querela*. The defendant pleads the former verdict by way of *estoppel*, and concludes with a traverse ABSQUE HOC that the taking of his goods was an act of hostility.

*[38]

* This was argued by HOLLOWAY, *Serjeant*, *for the plaintiff*, and by JONES, *Serjeant*, *for the defendant*, who chiefly insisted, That the defendant having pleaded the substance of this matter before, and being found against him, that he, being now plaintiff, could not aver any thing against that record.

But THE COURT were all of opinion, that judgment should be given for the plaintiff; for his remedy was very proper upon the Convention, and without the statute of Confirmation: and here is no *estoppel* in the case; for whether this was an act of hostility or not,

BENSON *against* IDLE.

Hob. 207.

not, is not material: neither was it, or could it be, an issue upon the former trial, because all the matter then in question was concerning the trespass, which though found against the now-plaintiff, yet it might be an act of hostility; but if it were an *estoppel*, it is not well pleaded with a *traverse*, and the Court hath set it at large.

TRINITY TERM,

The Twenty-Seventh of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*

Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.* } *Justices.*
Sir William Ellis, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

* Mayor and Commonalty of London *against* Gatford. Case 26.

A *custom* to elect a scavenger in the borough-court of *Southwark* is taken away by an act of parliament ordaining, that scavengers shall be chosen in *London* and *Westminster*, and the liberties thereof, according to the ancient usages thereof, and appointing a new form of election in *all other places*; for the statute being *affirmative* destroys a local custom inconsistent with it.—S. C. 1. Freem. 203. 1. Sid. 77. 135. 1. Lev. 79. Hard. 375. Ray. 59. 76. 3. Peer. Wms. 341. 491. 1. Bl. Rep. 240. 1. Term Rep. 728.

DEBT for a fine of 13l. 6s. 8d. set upon the defendant by the steward of the borough of *Southwark*, for that he refused to take the oath and serve as *a scavenger* in the said borough, though duly elected according to custom there. Upon *nil debet* pleaded, the jury found a special verdict, the substance of which was as follows:

They find the statute of 14. *Car.* 2. c. 2. and the proviso therein which governed this case, *viz.* "That all streets and lanes in "*London*, *Westminster*, and the liberties thereof, shall be paved as "they have always used to be." Then follows another clause, by which it is enacted, "That *scavengers* shall be chosen in the "city of *London*, and the liberties thereof, according to the an-"cient usage and custom;" and likewise in the city of *West-minster*; but nothing is therein mentioned of *Southwark*; and in all other places a new form of choosing is prescribed, *viz.* "In "the other parishes the constables, church-wardens, &c. shall "meet in the Easter-week, and choose two *scavengers* in every "respective parish:" so that the intent of the act must be (though *Southwark* is not named) that still *scavengers* shall be chosen there,

MAYOR AND COMMONALTY OF LONDON *against* GATFORD.

as formerly; becaufe "*London* and *the liberties* thereof" are to follow their ancient cuftom in the choice of this officer; and *Southwark* is within the City liberties.

The queftion was, Whether the cuftom of choofing of him was not taken away by this ftatute, and fo the fine not well affeffed?

*[40] * BALDWIN, *Serjeant*, for the plaintiffs, argued, That admitting in *Southwark* a fcavenger may be chofen according to the new form prefcribed in the act, yet this ftatute was only in the affirmative, and did not thereby take away the cuftom of choofing him at the leet (*a*). Like the cafe in *Dyer* 50. an act that the youngeft fon fhall have an appeal of the death of his father, yet that doth not exclude the eldeft; becaufe it is the common law, and there are no words to reftrain him. In Doctor *Fofter's Cafe*, 11. *Co.* 63. by the ftatute of 35. *Eliz.* c. 1. againft recufants, which gives the penalty of twenty pounds a-month againft the offender, the twelve-pence for the neglect of every *Sunday*, given by a former ftatute, the 1. *Eliz.* c. 2. is not taken away. But where there is a negative claufe in an act of parliament, the law is otherwife; as an act that the feffions of the peace fhall be kept at *Beaumaris* only, *et non alibi infra com. &c.* and the juftices kept it at another place, and feveral were indicted before them at that time; and the juftices were fined, and all their proceedings held *coram non judice*, by reafon of the negative prohibition: *Dyer*, 135. By the ftatute of MAGNA CHARTA, *cap.* 34. a woman fhall bring no appeal but for the death of her hufband, which fhe might at common law before the making of this ftatute; if therefore fhe is heir to her father, the appeal which fhe might have brought for his death, by thefe negative words is taken away.

(*a*) Hob. 173
Dyer, 341. b.
Hob. 17.
1. Hawk. P. C. 23.
1. Inft. fect. 500.
2. Inft. 68.

BARRELL, *for the defendant.* Though this law be in the affirmative, yet fince it doth not prejudice any perfon, neither can it be injurious: if *fcavengers* are chofen as directed by the act, it fhall be taken as a negative claufe: and for this many inftances may be given; as the ftatute for devifing part of the teftator's land doth not take away the cuftom to devife the whole, for that would be an apparent prejudice to the parties; but not fo in this cafe, where it is not found that the lord of the manor fuftains any lofs, for he is to have nothing when a fcavenger is chofen in the leet; nor a[illegible] the inhabitants prejudice[illegible] for by this new choofing their ftreet[illegible] fhall be kept as clean as before. The form here eftablifhed doth not confift with the cuftom, and fo hath the effect of a negative claufe, *Hob.* 298. It a[illegible]ears by the fcope of the act, That the intent of the parliament w[illegible] to take away thofe old cuf- *[41] toms of cho[illegible] because the cuftoms are exprefsly faved in *London* and *Weftminfter*; but in all other places a new way is appointed. The pavement of the ftreets in *Southwark* fhall be as before; but that claufe [illegible]her, and therefore concerns not the cafe of a fcave[illegible] wh[illegible] is not to *pave* but *cleanfe* the ftreets. And the [illegible]ds, [illegible] "liberties of the city of "*London*,"

" *London*," will not help, because *Southwark* is not comprehended under them in that clause, no more than are the lands which they have in *Yorkshire*; for the word *liberties* there is taken for *limits*, and can admit of no other construction.—Lastly, That the plaintiff cannot have judgment, because he hath not alledged the custom to be, that the steward may fine in case of the refusal to take the oath, &c.; and customs are to be taken strictly.

Postea, 48. 8. Mod. 297. Fitzg. 55. Stra. 786. 1224. Ld. Ray. 1135.

THE CHIEF JUSTICE, and ATKINS, *Justice*, said, that it is true, scavengers are under the power of the court-leet, by custom, and, in case of refusal, may be fined, as well as an ale-taster. But this act of parliament having taken notice that there were scavengers before that time, and *Southwark* being therein named as distinct from the liberties of *London*, for it is provided, that *Westminster*, *London*, and the liberties thereof, and *Southwark*, are to have the streets paved as before, which doth not belong to the office of a scavenger, that clause in the act concerns not this case; but where it enacts, " that in *London* and *Westmin-* " *ster* scavengers shall be chosen as before," but in all other places appoints a new way, this is as much as if it had said, that scavengers shall be chosen in every place as by the act prescribed, and no other way, except in *London* and *Westminster*: and so great is the [illegible] between *the custom* and *the* [illegible] that they cannot stand both together; therefore, though the act is but temporary, the custom is suspended: and though it may be some damage to the lord to make such construction, yet that will not alter the case; for law-makers are presumed to have respect to the public good more than to any private man's profit; and the lord may be said in this case to have dispensed with his interest, being a party to the act and consenting thereunto.

But WYNDHAM and ELLIS, *Justices*, inclined, that the custom did continue, because the act was in the affirmative; and therefore * they would not construe it to take away a man's right and interest, or a custom where he hath a benefit, as the lord of the manor had in this case, who is prejudiced by the loss of his fees: and the intent of the statute seemed to them to be, that scavengers should be chosen where none were before, but not to take away customs for chusing of them: But another argument was desired by SERJEANT HOWELL, the *Recorder of London*. * [42]

Rozal *against* Lampen.

Case 27.

CONSPIRACY. The plaintiff *Rozal* declares, That a replevin was brought against him and others, and that the defendant *Lampen* appeared for him without any warrant, and avowed in his name, and suffered judgment to pass against him, and

If judgment be given for a defendant, for a default of the *venue*, or other defect in the declaration, he cannot plead this " judgment recovered " in bar to another action for the same cause.—S. C. post. 294. 319. S. C. 1. Mod. 207. 2. Roll. Abr. 57. 6. Co. 7. 1. Leon. 24. 2. Lev. 210. 10. Mod. 210. 3. Mod. 1. Ray. 472. Pollex. 634. 1. Com. Dig. " Action" (L 4). 1. Term Rep. 273.

ROZAT against LAMPEN

that twenty-two pounds and ten shillings damages were recovered against him at such a place.—The defendant *Lampen* pleads a recovery in a former action brought by the now plaintiff, the record of which being recited in the plea, appears to be the same with this; but only here *the place* is mentioned where the damages were recovered, which was omitted in the former action, to which *Lampen* had pleaded a retainer by one of the then defendants in replevin, and upon a demurrer had judgment. But the truth of the case was, that judgment was not then given for him that his plea was good; for the Court were all of opinion, that it was naught. But because the declaration was not good, for want of mentioning the place where the damages were recovered, which the plaintiff had amended now, the plaintiff demurred again, because of this *variance* between the two actions upon the defendant's own shewing.

SIR ROBERT SHAFTOE, *for the plaintiff*, insisted, That a recovery in an action is no bar where there is a substantial *variance*, as here there is; and that so it has been adjudged, in the case of *Leach v. Thompson*, 1. *Roll. Abr.* 353. *lit. B. pl.* 1. where the plaintiff declared, That he, at the defendant's request, having promised to marry the defendant's daughter, he promised to pay him a thousand pounds; and upon *non assumpsit* pleaded, judgment was given for the defendant; and the plaintiff brought another action for the same sum, and then laid the promise to pay the thousand pounds *cùm inde requisitus esset*: and it was adjudged, that the
*[43] former judgment was no bar to the last action, * because there was a material difference between the two promises; one being laid without request, and so the money was to be paid in a convenient time; and in the last, the request is made part of the promise, and must be specially alledged, with the time and place where it was made. So in this case, the plaintiff had not declared right in his first action, which he had amended now, and therefore the former judgment shall be no bar to him. In *Robinson's Case*, there was a mistake in the writ, *viz.* a formedon *in remainder*, for that *in reverter*; and held no bar: so by a parity of reason there shall be no bar here, because the first declaration was mistaken, and it was *vitium clerici*. *Vide Cro. Jac.* 284. *Level v. Hall.*

Stat. Hen. 7. c. 1.
Sid. 316.

BARTON, *Serjeant*, *contra*. This is no new action; for the ground of it is, not where the damage was done, or recovered, but the appearing without a warrant; and so having pleaded a retainer and had judgment, and now pleading that judgment to this action, and averring it was for one and the same thing, it is a good bar, which the plaintiff by his demurrer hath confessed.—*Adjournatur* (*a*).

(*a*) In the case of Sherborn *v.* Stapleton, in the common pleas, Hilary Term, 13. *Geo.* 3. Roll 136. it was said, that the record in this case cannot be found; but in the same case, 1. Mod. 207. under the name of Lampen *v.* Kedgwin, it is held, that the recovery in the former action was no bar. And see Rose *v.* Stander, post. 294. and Putt *v.* Roster, post. 319.

Milward

Milward *against* Ingram. Case 28.

INDEBITATUS ASSUMPSIT for fifty pounds, and *quantum meruit.* The defendant confesses both; but pleads, That after the promise made, and before the action brought, they came to an account concerning divers sums of money, and that he was found in arrear to the plaintiff thirty shillings; whereupon, in consideration the defendant promised to pay him the said thirty shillings, the plaintiff likewise promised to release and acquit the defendant of all demands.—The plaintiff demurred.

To *assumpsit* upon an *indebitatus* and a *quantum meruit* for fifty pounds the defendant may plead, that after the promise, and before the action, there was an *account stated* between him and the plaintiff, and upon his promising to pay the balance the plaintiff promised to release.

S. C. 1. Mod. 205.

SEYS, *Serjeant*, argued for the plaintiff, That though one promise might be discharged by another, yet a duty certain cannot, (as in this case) where a demand was of a sum certain, by the *indebitatus*. Besides, this plea is in nature of *an accord*, which cannot be good without an averment of *satisfaction* given, *Bro.* "*Accompt*," 46. 48. Neither is it said, that the plaintiff promised in consideration that the defendant *ad instantiam* of the plaintiff had promised.

* [44]

S. C. 1. Freem. 195. Post. 259. Cro. Car. 38 2. Leon. 214 1. Sid. 177. 3. Lev. 238. Ray. 42. Cro. Jac. 100 (620). Comyns, 98. Fitzg. 202. 30 12. Mod. 214. 406 517. 537. Stra. 422. 426. 573. 648. 615. 653. Ld. Ray. 122. 235 664. 680. 733. 968. 1. Com. Dig. 150. 5. Com. Dig. "Pleader" (2 G 11). 1. Bac. Abr. 180. 4. Bac. Abr. 88. 2. Term Rep 479. 483. 2. Cro. 100.

* HOPKINS, *Serjeant*, answered, and admitted to be true, That where a matter is pleaded by way of *accord*, it must be averred to be executed in all points; but that was not the present case. The defendant hath pleaded, FIRST, That he and the plaintiff had *accounted together*, and so the contract is gone by the accompt.—SECONDLY, That he was discharged of the contract by parol; both which the plaintiff had now admitted by his demurrer. And it will not be denied that a parol discharge of an *assumpsit* is good; as where *A.* promised to perform a voyage within a time limited, and the breach being assigned that he did not go the voyage, the defendant pleads, that the plaintiff *exoneravit eum*; and, upon demurrer, it was held good, 22. *Edw.* 4. *pl.* 40. 3. *Hen.* 6. *pl.* 37. If it be objected, that it is no consideration to pay a just debt, for if thirty shillings were due, of right it ought to be paid, and that can be no reason upon which to ground a promise; I answer, It is a good consideration to pay money on the day which the party is bound to upon bond, because it is paid without suit or trouble, which might be otherwise a loss to the plaintiff. But in this case here is an express agreement, and before there was only a contract in law, *Cro. Car.* 8. *Flight v. Crasthu.*

NORTH, *Chief Justice.* It has been always taken that if there be an *assumpsit* to do a thing, and there is no breach of the promise, that it may be discharged by *parol*; but if it be once broken, then it cannot be discharged without release in a *writing*. In this case there are two demands in the declaration, to which the defendant pleads *an account stated*, so that the plaintiff can never after have recourse to the first contract, which is thereby merged in the account. If *A.* sell his horse to *B.* for ten pounds, and, there being divers other dealings between them, they come to an account upon the whole, and *B.* is found in arrear five pounds, *A.* must bring his *insimul computasset*; for he can never recover upon an

MILWARD against INGRAM.

indebitatus assumpsit.—And of the same opinion were the other three Justices: and though it was not said *ad instantiam* of the plaintiff that he promised, yet it was *ad tunc et ibidem*, and so should be intended that the defendant made the promise *at the instance* of the plaintiff: and so judgment was given for the defendant.

* [45]

Case 29.

* Daws *against* Sir Paul Pindar.

The statute 5. *Edw.* 6. c. 16. concerning the sale of offices, does not extend to the sale of the office of secretary to the governor of *Barbadoes*.

S. C. 3. Keb. 26.
S. C. 1. Freem. 175.
S. P. 4. Mod. 222.
Prec. Chan. 207.
1. Peer. Wms. 431.
Eq. Caf. Abr. 289.
1. Brown's Caf. P. 238.
1. Bl. Rep. 234.

COVENANT to pay a sum of money within a year after one *Nokes* shall be admitted to the office of secretary to the governor of *Barbadoes*.

The defendant pleads, That the governor of *Barbadoes* and the council there have power of probate of wills, and the granting of administrations; that the secretary belongs and is an officer to the said governor and council as REGISTER, and is concerned about the registering the said wills, and so his office concerns the administration of justice; and then sets forth that this covenant, upon which the plaintiff brought his action, was entered into upon a corrupt agreement, and for that reason void.

The plaintiff replies, *protestando* that this office concerned not the administration of justice; and *protestando* that here was no corrupt agreement; and for plea he saith, that *Barbadoes* is *extra quatuor maria*, and was always out of the allegiance and power of the kings of *England* until *King Charles the First* reduced that island to his obedience, which is now governed by laws made by him, and not by the laws of *England*.

The defendant rejoins, *protestando* that this island was governed by the laws of *England* long before the reign of *King Charles the First*, and confesses it to be *extra quatuor maria*; but pleads, that before *King Charles* had that island, *King James* was seised thereof, and died such a day so seised; after whose death it descended to *King Charles the First*, as his son and heir; and that he being so seised, on the second day of *July*, in the third year of his reign, granted it under the great seal of *England* to the *Earl of Carlisle* and his heirs at such a rent; ABSQUE HOC, that *King Charles the First* acquired this island by conquest.

BALDWIN, *Serjeant*, demurred, For that the traverse is ill; for the most material thing in the pleadings was, whether *Barbadoes* was governed by the laws of *England*, or by particular laws of their own? and if not governed by the laws of *England*, then the statute made 5. *Edw.* 6. c. 16. concerning the sale of offices, doth not extend to this place. He said, that it was but lately acquired, and was not governed by the laws of *England*; that it was first found out in *King James*'s reign, which was long after the making of that statute, and therefore could not extend to it. * The statute of 1. *Edw.* 6. c. 7. enacts, "That no writ shall abate if the defendant (pending the action) be created a *duke* or *earl*, &c." and it has been doubted, whether this act extended to a *baronet*, being

* [46]

being a dignity created after the making thereof: *Sir Simon Bennet's Case*, *Cro. Car.* 104. Statutes of *England* extend no more to *Barbadoes* than to *Scotland* or *Virginia*, or *New England*, or the Isles of *Jersey* and *Guernsey*. It is true, an appeal lies from those islands to the king in council here, but that is by constitutions of their own. No statute extended to *Ireland* till *Poyning's Law*, nor now, unless named. In *Barbadoes* they have laws different from ours; as, that a deed shall bind *a feme covert*, and many others.

DAWS *against* SIR PAUL PINDAR. Syd. 40.

SEYS, *Serjeant*, *contra*. He agreed, that the traverse was ill, and therefore did not endeavour to maintain it; but said, there was *a departure* between the declaration and the replication; for in the declaration the plaintiff sets forth, that *Nokes* was admitted secretary *apud insulam de Barbadoes*, VIZ. *in parochiâ Sancti Martini in Campis*; and in the replication he sets forth, that this isle was not in *England*, which is in the nature of *a departure*: as debt upon bond dated the first of *May*, the defendant pleads a release the third of *May*; the plaintiff replies *primo deliberat.* 4. *Maii*; it is *a departure*; for he should have set forth, that the bond was 4. *Maii primo deliberat.* *Quære*, *Bro.* "*Departure*," 14. So in a *quare impedit* the bishop pleaded that he claimed nothing but as ordinary; the plaintiff replies, *quòd tali die et anno* he presented his clerk, and the bishop refused him; the bishop rejoins, that at the same day another presented his clerk, so that the church became litigious; and the plaintiff surrejoins, that after that time the church was litigious he again presented, and his clerk was refused; this was a departure. *Bro.* "*Departure*." So likewise as to the place, the tenant pleads a release at *C.*; the demandant saith, that he was in prison at *D.* and so would avoid the release as given by *duress*; and the tenant saith, that he gave it at *L.* after he was discharged and at large. 40. *Edw.* 3. *Bro.* 32. 1. *Hen.* 6, pl. 3. The plaintiff might have said, that *Nokes* was admitted here in *England*, without shewing it was at *Barbadoes*; for the grant of the office of secretary might be made to him here under THE GREAT SEAL OF ENGLAND, as well as a grant of administration may be made by the ordinary out of his diocese.—Secondly, he said, That by the *demurrer* to the *rejoinder* the plaintiff hath confessed his *replication* to be false in another respect; for by that he hath owned it: the defendant hath pleaded, * that *King James* was seised of this island, and that it descended to *King Charles*, &c. and so is a province of *England*; whereas before he had only alledged, that it was reduced in the time of *King Charles*, his son; and so he hath falsified his own replication. And besides, this is within the statute of 5. *Edw.* 6. c. 16.; for the defendant saith, that the plaintiff hath admitted *Barbadoes* to be a province of *England*; and it doth not appear, that ever there was a prince there, or any other person who had dominion, except the king and his predecessors; and then the case will be no more than if the King of *England* take possession of an island where before there was *[47]

DAWS *against* SIR PAUL PINDAR.

vacua possessio, By what laws shall it be governed? Certainly by the laws of *England*. This island was granted to the *Earl of Carlisle* and his heirs under a rent payable at THE EXCHEQUER, for which process might issue; and it descends to the heirs of the earl at the common law. And if it be objected, that they have a book of constitutions in *Barbadoes*, that is easily answered; for it is no record, neither can the Judges take any notice of it. It is reasonable, that so good a law as was instituted by this statute of 5. *Edw.* 6. c. 16. should have an extensive construction, and that it should be interpreted to extend as well to those plantations as to *England*; for if another island should be now discovered, it must be subject to the laws of *England*.—*Curia advisare vult (a)*.

(a) In S. C. 1. Freem. 175. it is said, that the Court were of opinion, that the statute does not extend to *Barbadoes*; for that all islands and other places *extra quatuor maria*, though they are part of the king's dominions, yet they are not governed by the laws of England, unless it be so appointed by act of parliament. But in S. C. 3. Keb. 26. it is said, the Court inclined, that *the plea* is good, the office being granted by patent under the great seal of England. But see the case of Blankard v. Galdy, 4. Mod. 222.

Case 30.

Lever *against* Hosier.

Recovery suffered of lands in *a liberty*, passeth lands in *a distinct vill* within that *liberty*.

S. C. 1. Mod. 206.
S. C. 3. Keb. 508. 568.
Post. 233.
Cro. Eliz. 693.
Cro. Jac. 120. 574.
Cro. Car. 269. 276.
8. Mod. 276.

THIS was a special verdict in ejectment. The case upon the pleading was thus: *Sir Samuel Jones* being tenant in tail of lands in *Shrewsbury* and *Cotton*, being within the liberties of *Shrewsbury*, suffers a common recovery of all his lands lying within the liberties of *Shrewsbury*; and, Whether the lands in *Cotton*, which is a distinct vill, though within the liberties, shall pass? was the question.

JONES, *Serjeant*, argued, That they should not pass; for though lands would pass so by a fine, because it was the agreement of the parties, yet in a recovery it is otherwise, because more certainty is required therein. But in fines no such certainty is required, and therefore a fine *de tenementis* in *Golden-lane* hath been held good, though neither vill, parish, or hamlet, is mentioned *(b)*. * But there being a vill called *Walton*, in the parish of *Street*, and a fine being levied of land in *Street*, the lands in *Walton* did not pass, unless *Walton* had been an hamlet of *Street*, and the fine had been levied of lands in the parish of *Street (c)*. And the reason of this difference is, because in fines there are covenants, which though they are real in respect of the land, yet it is but a personal action, in which the land is not demanded *ex directo*; but in a recovery greater preciseness is required, that being a *præcipe quòd reddat*, where the land itself is demanded, and the defendant must make answer to it. *Cro. Jac.* 574. 5. *Co.* 40. *Dormer's Case*. The word "liberty" properly signifies a right, privilege, or franchise, but improperly "the extent of a place." *Hil.* 22. & 23. *Car.* 2.

* [48]

1. Vent. 170.
3. Com. Dig. 346.
Cruise on Recov. 16. 167. 170.
2. Bac. Abr. 545.
2. Wils. 116.
Cowp. 351.

(b) Wakefield v. Hodgeson, Cro. Eliz. 693. See also the case of Mark v. Butler, Cro. Jac. 574.

(c) See the case of Addison v. Otway, 1. Mod. 250. Post. 233.

Rot.

Rot. 225. *B. R. Waldron's Case*, and the Case of *Baker v. Johnson* (*a*). Liberties, in judgment of law, are incorporeal; and therefore it is absurd to say, that lands which are corporeal shall be therein contained. They are not permanent, having their existence by the king's letters patents, and may be destroyed by act of parliament; they may also be extinguished, abridged, or increased; and a *venire facias* of a (*b*) liberty or franchise is not good; it is an equivocal word, and of no signification that is plain, and therefore is not to be used in real writs. *Rast. Entr.* 382. There is no *præcipe* in THE REGISTER to recover lands within a liberty, neither is there any authority in all the law-books for such a recovery; and therefore if such a thing should be allowed, many inconveniences would follow; for a good tenant to the *præcipe* would be wanting, and the intent of the parties could not supply that. LEVER against HOLLER.

But BARTON, *Serjeant*, said, That this recovery would pass the lands in *Cotton*; for as to that purpose, there was no difference between *a fine* and *a recovery*; they are both become common assurances, and are to be guided by the agreement of the parties. *Cro. Car.* 270. 276. It is true, a fine may be good of lands in a hamlet, *lieu conus*, or parish. 1. *Hen.* 5. *pl.* 9. *Cro. Eliz.* 692. *Jones*, 301. *Cro. Jac.* 574. *Monk v. Butler*. Yet in a (*c*) *scire facias* to have execution of such fine the vill must be therein mentioned. *Bro.* "*Brief*," 142. The demand must be of lands in a vill, hamlet, or at farthest in a parish. *Cro. Jac.* 574. Postea. 2. Roll. Abr. 20. Godb. 440.

* THE WHOLE COURT was of that opinion (*absente* ELLIS, who was also of the same opinion at the argument); and accordingly, in *Michaelmas Term* following, judgment was given, that by this recovery the lands in *Cotton* did well pass. * [49]

And NORTH, *Chief Justice*, denied the Case of *Baker v. Johnson* to be law, where it is said, a common recovery of lands in a *lieu conus* is not good; and said, that it had been long disputed whether a fine of lands in a *lieu conus* was good; and in *King James*'s time the law was settled in that point that it was good: and by the same reason a recovery shall be good; for they are both amicable suits and common assurances; and as they grew more in practice, the Judges have extended them farther. A common recovery is held good of an advowson; and no reasons are to be drawn from the *visne*, or the execution of the writ of seisin; because it is not in the case of adversary proceedings, but by agreement of the parties, where it is to be presumed each knows the other's meaning. Indeed the cursitors are to blame to make the writ of entry thus, and ought not to be suffered in such practice. Where a fine is levied to two, the fee is always fixed in the heirs of one of them; but if it be to them and their heirs, yet it is good, though incertain; but a liberty is in the nature of 5. Com. Dig. 284.

(*a*) Hutton, 105.; and see ante.

(*b*) Rast. Ent. 267.

(*c*) Godb. 440. *contra*.

a lieu

LEVER against HOSIER.

a *lieu conus*, and may be made certain by averment. The jury in this case have found *Cotton* to be *a vill* in *the liberty* of *Shrewsbury*; and so it is not incorporeal.

Case 31.

Alford *against* Tatnel.

If a plaintiff recover for the escape of one defendant, the other shall have *audita querela*.—S. C. 1. Mod. 170. 12. Mod. 105. 598. Ld. Ray. 439. 1. Com. Dig. 461. 3. Bac. Abr. 699. 2. Bl. Rep. 1050.

JUDGMENT AGAINST TWO, who are both in execution, and the sheriff suffers one to escape; the plaintiff recovers against the sheriff, and hath satisfaction; the other shall be discharged by an *audita querela*.

*[50]

Case 32.

* Osbaston *against* Stanhope.

In debt against an *heir*, if the defendant plead, that his ancestor, under a settlement, leased the estate for years, and that he hath no assets *præter* the reversion expectant upon the said lease, the plaintiff may reply generally, that he hath assets by discent; for the reversion is assets by discent immediately, although the heir cannot have the benefit of it till the lease is determined.

S. C. 3. Salk. 180. S. C. 1. Freem. 160. 8. Co. 134. Carth. 129. 6. Co. 58. Abr. Eq. 149. 275. 1. Peer. Wms. 775. 2. Peer. Wms. 234. 645. Prec. Chan. 39. 232. 7. Mod. 42. 10. Mod. 487. 11. Mod. 5. Cases Temp. Talb. 220. 2. Barnes, 136. Stra. 232. 665. 879 1028. 1095. 1270. Ld. Ray. 53. Salk. 354. 3. Mod. 257. 2. Vern. 248. 3. Bac. Abr. 33. 4. Bac. Abr. 69. 1. Brown's Cases in Chan. 247.

DEBT UPON BOND against *an heir*, who pleaded, that his *ancestor* was seised of such lands in fee, and made a settlement thereof to trustees, by which he limited the uses to himself for life, remainder to the heirs males of his body, remainder in fee to his own right heirs, with power given to the trustees to make leases for three lives or ninety-nine years. The trustees made a lease of these lands for ninety-nine years, and that he had not assets *præter* the reversion expectant upon the said lease. The plaintiff replies, *protestando* that the settlement is fraudulent; *pro placito* saith, that he hath assets by discent sufficient to pay him: and the defendant demurs.

NEWDIGATE, *Serjeant*, *for the defendant*. The bar is good; for the plaintiff should not have replied, generally, that the defendant hath assets by discent, but should have replied to the *præter*. *Hob.* 104. Like the case of *Goddard v. Thorlton*, *Yelv.* 170. where in trespass the defendant pleaded, that *Henry* was seised in fee, who made a lease to *Saunders*, under whom he derived a title, and so justifies; the plaintiff replies, and sets forth a long title in another person, and that *Henry* entered and intruded: the defendant rejoins, that *Henry* was seised in fee, and made a lease *ut prius*; ABSQUE HOC that *intravit et se sic intrusit*: and the plaintiff having demurred, because the traverse ought to have been direct, *viz.* ABSQUE HOC *quod intrusit*, and not ABSQUE HOC that *Henry intravit*, &c. it was said the replication was ill; for the defendant having alledged a seisin in fee in *Henry*, which the plaintiff in his rejoinder had not avoided, but only by supposing an intrusion which cannot be of an estate in fee, but is properly after the death of tenant for life, for that reason it was held ill.

But PEMBERTON, *Serjeant*, *for the plaintiff*, held the replication to be good. The defendant's plea is no more than *riens per*

discent;

discent; for though he pleads a reversion it is not chargeable, because it is a reversion after an estate tail, and therefore the pleading the lease is not material; for if it were a lease expired, yet the plaintiff could not recover; and therefore the *præter* is wholly idle and insignificant, of which the plaintiff ought not to * take notice, because the lands which come under the *præter* are not chargeable. The plaintiff hath traversed, as he ought, what is material, and is not bound to take notice of anything more.

OSBASTON *against* STANHOPE.

[51]

THE WHOLE COURT was of that opinion, and held the *præter* idle, and the general replication good: and judgment was given for the plaintiff (*a*).

(*a*) See 29. *Car.* 2. c. 3. f. 10. & 11. and 3. & 4. *Will.* & *Mary*, c. 14.

Prince *against* Rowson, Executor of Atkinson. Case 33.

Executor *de son tort* cannot retain for his own debt.

2. Vent. 180. Stiles, 337. Post. 293.

EXECUTOR *de son tort* cannot retain. The defendant in this case pleaded, that the testator owed his wife *dum sola* eight hundred pounds, and that he made his will; but doth not shew that he was thereby made executor; and therefore having no title he became EXECUTOR *de son tort*:—for which cause his plea was held ill; and judgment was given for the plaintiff (*b*).

5. Co. 30. Yelv. 137. Moor, 527. Godb. 216. 1. Mod. 128. 208. 2. Vern. 147. Prec. Chan. 179. 12. Mod. 441. 471. Stra. 1106. 2. Term Rep. 97. 597.; and see the case of Curtis v. Vernon, 3. Term Rep. 587.

(*b*) See 43. *Eliz.* c. 8.

Norris *against* Palmer. Case 34.

An action in the nature of conspiracy lies after acquittal, for causing a person to be falsely and maliciously indicted for trespass.

THE PLAINTIFF brought an action on the case against the defendant, for causing him *falsò et malitiosè* to be indicted for a common trespass in taking away one hundred bricks, by which means he was compelled to spend great sums of money, and that upon the trial the jury had acquitted him.—The defendant demurred to the declaration.

1. Roll. Abr. 112. F. N. B. 116. Ray. 176. 3. Assize, 15. Post. 306. 1. Roll. Abr. 312. T. Jones, 135. 2. Sid. 100. 1. Sid. 463.

BARRELL, *Serjeant*, *for the defendant*, said, That the action would not lie; and for a precedent he cited a like judgment in the case of *Langley v Clerk* in the king's bench, *Trin.* 1658; in which action the plaintiff was indicted for a battery with an intent to ravish a woman, and being acquitted brought his action: and the Court after a long debate gave judgment for the plaintiff; but agreed that the action would not lie for a common trespass, as if it had been for the battery only; but the ravishing was a great scandal, and for that reason the plaintiff recovered there: but this is an ordinary trespass, and therefore this action will not lie.

Cro. Car. 291. 10. Mod. 145. 209. 219. 12. Mod. 4. 208. 257. 273. 555. Stra. 114. 691. Ld. Ray. 377. 381. 1. Salk. 14. 1. Com. Dig. 157. 2. Wils. 302. 2. Term Rep. 225. 4. Term Rep. 247.

But

NORRIS *against* PALMER.

But PEMBERTON, *Serjeant*, held, that the action would lie, because it was in the nature of a conspiracy, and done falsely and maliciously, knowing the contrary, and thereby the plaintiff was put to great charges; all which is confessed by the demurrer.

* [52] * And the case cited on the other side is express in the point; for the Court in that case could take notice of nothing else but the battery; for the intent to ravish was not traversable, and therefore it was idle to put it into the indictment. It is now settled, that an action on the case will lie for *a malicious arrest* where there is no probable cause of action (*a*); and this case is stronger than that, because in the one the party is only put to charges, and in the other both to charges and disgrace, for which he hath no remedy but by this action.

THE COURT agreed, that the action would lie after an acquittal upon an indictment for a greater or lesser trespass: the like for citing another into the spiritual court without cause. *F. N. B.* 116. *D.* 7. *Edw.* 4. *pl.* 30. 10. *Hen.* 4. *Fitz.* "*Conspiracy*," 21. 13. 3. *Edw.* 3. *pl.* 19.

The defendant's counsel consented to waive the demurrer, and plead, and go to trial.

(*a*) Hob. 267. Comyns, 190. 1. Salk. 14. Cro. Eliz. 836, Lutw. Lutw. 68. *Sed vide* 3. Lev. 210. 1570.

The King *against* Turvil.

Case 35.

If the king present to a benefice on being intitled to it by a simoniacal contract, his presentee shall not be removed, though the simony is pardoned.

S. C. 1. Freem. 197. Hob. 167. Sid. 167. Saund. 362. 1. Lev. 120. 8. Mod. 6. 185. 10. Mod. 174. 365, 407. 11. Mod. 235. 12. Mod. 119. Fitzg. 30. 37. Stra. 473. 516. 529. 841. 912. 1272. Ld. Ray. 5. 214. 257. 709. 818. 3. Bac. Abr. 807. 810.

QUARE IMPEDIT. The king was intitled to a presentation by the statute of 31. *Eliz.* c. 6. because of a simoniacal contract made by the rightful patron, and he accordingly did present. Then comes the act of general pardon 21. *Jac.* 1. c 35. by which under general words (it was now admitted) that simony was pardoned; in which act there is a beneficial clause of restitution, *viz.* "The king giveth to his subjects all goods, chattels, "debts, fines, issues, profits, amerciaments, forfeitures, and "sums of money forfeited by reason of any offence, &c. done."

The question was, Whether the king's presentee or the patron had the better title?

This case was only mentioned now, but argued in *Michaelmas Term* following by JONES, *Serjeant*, that the king's presentee is intituled. He agreed that simony was pardoned, but not the consequences thereof; for it is not like the case where a stroke is given at one time and death happens at another: if the stroke, which is the first offence, is pardoned before the death of the party, that is a pardon likewise of the felony; for it is true, the stroke being the cause of the death, and that being pardoned, all the natural effects are pardoned with the cause (*b*). But legal consequences are not thus pardoned; as if a man is outlawed in trespass, and the king pardons the outlawry, the fine remains, 6. *Edw.*

(*b*) See the case of Cuddington *v.* Wilkins, Hob. 67. 82.; and Reilly's Case, Cases in Crown Law, 362.

THE KING *against* TURVIL.

4. *pl.* 9. 8. *Hen.* 4. *pl.* 21. 2. *Roll. Abr.* 179. * In this act of pardon, there are words of grant, but the presentation is not within the clause of restitution; for it is an *interest* and not an *authority* vested in the king, and therefore a thing of another nature than what is intended to be restored; because it is higher, and shall not be comprehended amongst the general words of goods and chattels, &c. which are things of a lower nature, and are all in the personalty, *Cro. Car.* 354.

CONYERS, *Serjeant*, argued for the title of the patron, and said, that there were three material clauses in this act.—FIRST, A pardon of the offences therein mentioned in general and particular words.—SECONDLY, That all things not excepted shall be pardoned by general words, as if particularly named.—THIRDLY, The pardon to be taken most favourably for the subject; upon which clauses it must necessarily follow, that this offence is pardoned, and then all the consequences from thence deduced will be likewise pardoned; and so the patron restored to his presentation, for all charters of restitution are to be taken favourably, *Pl. Com.* 252. The presentation vests no legal right in the presentee; for in the case of the king, it is revocable after institution and before induction, *Co. Lit.* 344. b. So likewise a second presentation will repeal the first, *Rolls*, 353. And if the king's presentee dies before induction, that is also a revocation. If therefore the party hath no legal right by this presentation, and the king by the simony had only an authority to present, and no legal interest vested, then by this act he hath revoked the presentation, and the right patron is restored to his title to present.

THE COURT were all of opinion (*absente* ELLIS), That the king's presentee had a good title, and by consequence the patron had no right to present this turn; for here was an interest vested in the king; like the case where the king is intitled to the goods of a *felo de se* by inquisition, and then comes an act of indemnity, that shall not divest the king of his right. But where nothing vests before the office found, a pardon before the inquisition extinguishes all forfeitures, as it was resolved in *Tomb's Case (a)*. So if the pardon, in this case, had come before the presentation, the party had been restored *statu quo*, *&c.* * The king can do no more, the bishop is to do the rest; neither is the presentation revoked by this act. It might have been revoked by implication in some cases; as where there is a second presentation; but such a general revocation will not do it. [54

JUDGMENT was given for the plaintiff, and a writ of error brought; but the cause was ended by agreement.

(*a*) See also 5. Co. 110. 3. Inst. 54. 1. Hawk. P. C. 104. 2. Hawk. P. C. 1. Sid. 150. 1. Saund. 362. 3. Mod. 559.
200. 241. Plowd. 260. 1. Hale, 414.

Case 36. **Hill *against* Pheasant.**

If a person lose 80l. at one time, for which he gives security, and 70l. more to the same person at another time, this is not gaming within the 16. *Car* 2. c. 7. unless the several meetings were appointed to evade the statute.

S. C. 1. Freem. 200. Post. 279. Sid. 394. 1. Vent. 253. 1. Lev. 244. 2. Lev. 92. 5. Mod. 6. 175. 8. Mod. 57. 187. 10. Mod. 336. 12. Mod. 540.

AN ACTION OF DEBT was brought upon the statute of 16. *Car.* 2. c. 7. made against deceitful and disorderly gaming, which enacts, "That if any person shall play at any game other than "for ready money, and shall lose any sum, or other thing played "for, above the sum of one hundred pounds, at any one time or "meeting, upon tick, and shall not then pay the same; that all "contracts and securities made for the payment thereof shall be "void, and the person winning shall pay treble the money lost." It happened that the defendant won eighty pounds at one meeting, for which the plaintiff gave security; and another meeting was appointed, and the defendant won seventy pounds more of the plaintiff; being in all above one hundred pounds: and, If this was within the statute? was the question.

The like case was in the king's bench, *Trinity Term*, 25. *Car.* 2. *Roll* 1230. between *Edgeberry* and *Rossender* (*a*); and in *Michaelmas Term* following, this case was argued.

THE COURT was divided: which the plaintiff perceiving, desired to discontinue his action. But the better opinion was, that it was not within the statute; though if it had been pleaded, that the several meetings were purposely appointed to elude the statute, it might be otherwise (*b*).

Stra. 495. 1159. Ld. Ray. 1034. 2. Wilf. 309. 4. Com. Dig. 800. 2. Bac. Abr. 621. 1. Term Rep. 56. 2. Term Rep. 610. 3. Term Rep. 693.

(*a*) The case of Edgeberry *v.* Rossender was an action to recover money won at a horse-race. The case was, That articles were made for horse-racing, by which it was agreed, that the parties should run their horses on the first of July for fifty pounds, and on the third of July for fifty pounds more, and on the sixth of July for fifty pounds more. The action was brought for the first fifty. The defendant pleaded, that there were one hundred pounds more won at *the same time* upon trust. THE COURT were of opinion, that this was a contract within the meaning of the 17. *Car.* 2. c. 7.; for though the race was to be run at several days, yet it being pursuant to the original agreement, which included all, it was just the same as if the three heats of the race had been on the same day. S. C. 1. Freem. 200. 358. 421. 1. Lev. 94. See also Hudson *v.* Maling, 3. Keb. 671. 1. Freem. 432.

(*b*) But all *securities* for money by gaming are void, 9. *Ann.* c. 14. See 2. Burr. 1078. 1082. and the case of Lowe *v.* Waller, Dougl. 736. 743.

Case 37. **Calthorp *against* Heyton.**

A traverse ABSQUE HOC *quod legitimo modo oneratus*, is not a good.

Ld. Ray. 356.

REPLEVIN. The defendant avowed, For that the king, being seised in fee of *a manor*, and of *a grange*, which was parcel of the manor, granted the inheritance to a bishop, reserving thirty-three pounds rent to be yearly issuing out of the whole; and alledges a grant of the *grange* from *Sir W. W.* (who claimed under the bishop) to his ancestors in fee; in which grant there was this clause, *viz.* "If the grantee or his heirs shall be legally charg-"ed by distress, or with any rent due to the king or his successors,

"upon

"* upon account of the said *grange*, that then it should be lawful "for them to enter into *Blackacre*, and distrain till he or they "be satisfied." And afterwards the grantee and his heirs were, upon a bill exhibited against them in THE EXCHEQUER, decreed to pay the king four pounds *per annum*, as their proportion out of the *grange*, for which he distrained, and so justified the taking. The plaintiff pleads in bar to the avowry, and *traverseth*, that the defendant was lawfully charged with the said rent; and the defendant demurred.

CALTHORP *against* HEYTON.

BALDWIN, *Serjeant*, maintained the avowry to be good, having alledged a legal charge, and that the bar was not good; for the plaintiff traverseth, *quod defendens est legitimo modo oneratus*; which being part matter of law, and part likewise matter of fact, is not good; and therefore if the decree be not a legal charge, the plaintiff should have demurred.

But SEYS, *Serjeant*, on the other side, argued, That the avowry is not good, because the defendant hath not set forth a legal charge, according to the grant, which must be by distress, or some other lawful way, and that must be intended by some execution at common law; for the *coactus fuit* to pay, is not enough; a suit in equity is no legal disturbance, *Moor* 559. The same case is reported in 1. *Brownl.* 23. *Selby v. Chute.* Besides, the defendant doth not shew any process taken out, or who were parties to the decree; and a *que estate* in the case of a bishop is not good, for he must pass it by deed.

NORTH, *Chief Justice*,* and THE WHOLE COURT: A rent in the king's case lies *in render*, and not *in demand*, and after the rent-day is past, he is *oneratus*. And the decree is not material in this case; for the charge is not made thereby, but by the reservation, for payment whereof the whole *grange* is chargeable. The king may distrain in any part of the land; he is not bound by the decree to a particular place; that is in favour only to the purchasor, that he should pay no more than his proportion. As to the *que estate*, the defendant hath admitted that, by saying *bene et verum est* that *Sir W. W.* was seised. The traverse is ill.

And judgment was given for the avowant.

*[56]

* Vaughan *against* Wood.

Case 38.

TRESPASS FOR TAKING BEEF. The defendant pleads a custom to choose supervisors of victuals at a *court leet*; that he was there chosen; and having viewed the plaintiff's goods, found the beef to be corrupt, which he took and burned.

A custom to chuse supervisors at a court-leet to inspect victuals, is good.

The plaintiff demurs, For that the custom is unreasonable; and when meat is corrupt and sold, there are proper remedies at law, by action on the case, or presentment at a leet, 9. *Hen.* 6. *pl.* 53. 11. *Edw.* 3. *pl.* 4. 6.

S. C. 1. Mod. 202. Cro. Jac. 555. Palm. 211. Raym. 232.

8. Mod. 297. Ld. Ray. 1163. 1. Com. Dig. "Copyhold" (S 6). 1. Term Rep. 125.

But

VAUGHAN *against* WOOD.

But THE COURT held it a good custom; and judgment was given for the defendant; THE CHIEF JUSTICE being not clear in it.

Case 39. **Chapter of Southwell *against* Bishop of Lincoln.**

A lease of the next avoidance made by a chapter that hath no dean, is void *ab initio*.—The Statute 13. *Eliz.* c. 10. is a public act.
S. C. 1. Mod. 204.
3. Co. 60.
Co. Lit. 45. 325. 341.
5. Co. 15.
10. Co. 60.
Yelv. 106.
Hard. 326.
1. Leon. 308.
Cro. Eliz. 207. 441.
3. Bac. Abr. 353. 391, 392.
1. Peer. Wms. 655.
Dougl. 573.

QUARE IMPEDIT. The question upon pleading was, Whether the grant of the next avoidance by THE CHAPTER, was good or not to bind the successor?

The doubt arose upon the statute of 13. *Eliz.* c. 10. which was objected not to be a public act, because it extends only to those who are ecclesiastical persons; or if it should be adjudged a public law, yet this is not a good grant to bind the successor; for though the grant of an avoidance is not a thing of which any profit can be made, yet it is an hereditament within the meaning of that statute; by which, among other things, it is enacted, "That all grants, &c. made by dean and chapter, &c. of any "lands, tithes, tenements, or hereditaments, being parcel of the "possessions of the chapter, other than for the term of twenty-"one years, or three lives, from the time of the making the said "grant, shall be void."

But it was agreed, by THE COURT, to be a general law; like the statute of non-residency, which hath been so ruled; and that this presentment or grant of the next avoidance was not good, because it was made by those who were not head of the corporation; and it must be void immediately, or not at all: and judgment was given accordingly.

*[57]

Case 40. *** Threadneedle *against* Lynam.**

A lease made by a bishop wherein more than the old rent is reserved, is good.
S. C. 1. Mod. 203.
S C. Pollex. 176.
S. C. 1. Freem. 92. 119. 165. 179.
S. C. 3. Keb. 392. 372. 583. 595.
2. Vern. 411. 431. 596. 711. 746.
Comyns 37.
1. Peer. Wms. 655.

THERE being two manors usually let for 67l. 1s. 5d. by the year, a bishop lets one of them for twenty-one years, reserving the whole rent.

And, Whether this was a good lease within the statute of 1. *Eliz.* c. 19.? was the question; which depended upon the construction of the words therein, *viz.* "All leases to be void "upon which the old accustomed rent is not reserved;" and here is more than the old rent reserved; and this being a private act is to be taken literally.

NORTH, *Chief Justice*, agreed that private acts which go to one particular thing are to be interpreted literally; but this statute extends to all bishops, and so may be taken according to equity; and therefore HE, and WYNDHAM and ATKINS, *Justices*, held the lease to be good.—But this case was argued when VAUGHAN was *Chief Justice*; and HE, and ELLIS, *Justice*, were of another opinion.

Prec. Chan. 124. 8. Mod. 249. 12. Mod. 249. 486. Gilb. Eq. Rep. 45. Stra. 1201. 3. Com. Dig. 253. 3. Bac. Abr. 364. Dougl. 565. 573. 3. Term Rep. 665.

MICHAELMAS TERM,

The Twenty-Seventh of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*
Sir Hugh Wyndham, *Knt.* }
Sir Robert Atkins, *Knt.* } *Justices.*
Sir William Ellis, *Knt.* }
Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

* Thorp *against* Fowle. Case 41.

NOTE, In this case THE COURT said, That since the statute of *Gloucester*, which gives no more costs than damages, it is usual to turn *trespass* into *case*. No more costs than damages.

Cooper *against* Hawkeswell. Case 42.

IN AN ACTION UPON THE CASE for these words: "I dealt "not so unkindly with you when you stole a stack of my corn: —PER CURIAM, The action lies. Words. 8. Mod. 24. 290. 371. 10. Mod. 197. 11. Mod. 61. 66. 12. Mod. 307. 344. 420. 597. 1. Barnes, 340. Strange, 142. 304. Ld. Raym. 813.

Escourt *against* Cole. Case 43.

IN AN ACTION ON THE CASE FOR WORDS laid two ways, the last count was *cumque etiam*, which is but a recital:—and DUBITATUR whether good. Words.

Case 44. Sharp *against* Hubbard.

The six months for proving of a suggestion shall be reckoned according to the *Calendar*.

Hob. 179. Strange, 652.

THE SIX MONTHS in which, by the statute 2. & 3. *Edw.* 6. c. 13. s. 14. the suggestion for a prohibition is to be proved, must be reckoned according to the *calendar months*; and it is so computed in the ecclesiastical court (*a*).

(*a*) 2. Roll. Abr. 521. Hob. 179. Lit. 19. *accord.* But in 4. Mod. 186. it is said, that the computation shall be by *lunar months*. See also that a month is regularly accounted in law twenty-eight days, Co. Lit. 135. 2. Roll. Abr. 521, 522. 6. Co. 62. Cro. Jac. 167. Cro. Eliz. 835. 4. Mod. 95. Skin. 314. Stra. 446. 652. 3. Burr. 1455. 1. Com. Dig. 357. Dougl. 463. 2. Bl. Com. 141. It is said, however, that where a statute speaks of six months in a matter which concerns *ecclesiastical affairs*, they shall be computed by *calendar months*, 1. Com. Dig. "Ann." (B); but this exception to the general rule of law seems confined to the case of a lapse in *quare impedit*, Co. Lit. 135. b. Cro. Jac. 166, 167.

Case 45. Crowder *against* Goodwin.

Process of an inferior court, directed *servienti ad clavem*, without saying *ministro curiæ*, is good.

ASSAULT AND BATTERY, AND FALSE IMPRISONMENT. As to the assault and battery the defendant pleads *not guilty*; and as to the imprisonment he *justifies* by a process out of an *inferior court*.—And upon demurrer these exceptions were taken to his plea:

*[59] * FIRST, The defendant hath set forth a precept directed *servienti ad clavem*; and it is not said *ministro curiæ*.—To this exception it was answered, That a precept may be directed to *a private person*; and therefore *servienti ad clavem* is well enough.

Process from an inferior court returnable at the *next court*, without mentioning a *day certain*, is good.

1. Roll. 434. Cro. Car. 254. Dyer, 262. Cro. Jac. 314. Raym. 204. 2. Bulst. 36. 1. Mod. 81. 1. Freem. 319. Cowp. 21.

SECONDLY, It was to take the plaintiff, and have him *ad proximam curiam*; which is not good; for it should have been on a *day certain*, like the case of *Adams v. Flythe* (*a*), where a writ of error was brought upon a judgment in debt by *nil dicit* in an inferior court; and the error assigned was, That after imparlance a day was given to the parties till the next court; and this was held to be a *discontinuance*, not being a day certain.—To this exception it was said, That it is likewise well set forth to have the plaintiff *ad proximam curiam*; for how can it be on *a day certain* when the Judge may adjourn the court *de die in diem*.

Process on a plaint in an inferior court is good, although it do not state the name of the plaintiff.

6. Co. 54. 1. Stra. 560. Ld. Ray. 894.

THIRDLY, It is not said *ad respondend. alicui.*—But as to this exception it was answered, That "*ad respondendum*," although it is not said "*alicui*," is good, though not so formal; and it is no *tort* in the officer; but it is to be intended that he is to answer *the plaintiff* in the plaint.

(*a*) Cro. Jac. 571.

FOURTHLY,

FOURTHLY, Nor that the action arose *infra burgum*.—But to this it was answered, That the defendant sets forth that he did enter his plaint *secundum consuetudinem curiæ burgi*; and when the plaintiff declared there, he shewed that the cause did arise *infra jurisdictionem*. A plaint is but a remembrance, and must be short, *Rastal*, 321.; and when it is entered the officer is excused; for he cannot tell whether it is *infra jurisdictionem* or not.

A justification under process from an inferior court is good, although it do not alledge that the cause of the plaint arose within the jurisdiction.—Ante, 29. Post. 195. Lilly, 195. Lev. Ent. 176. 2. Lutw. 914. 2. Lev. 81. Ld. Ray. 230. Cowp. 19. 2. Com. Dig. 615. 3. Term Rep. 183.

FIFTHLY, The precept is not alledged to be returned by the officer.—And as to this exception it was said, That the officer is not punishable though he do not return the writ. The end of the law is, that the defendant should be present at the day; and if the cause should be agreed, or the plaintiff give a release when the defendant is in custody, no action lies against the officer if he be detained afterwards.

In a plea of justification to trespass under process from an inferior court, it is not necessary to alledge that the officer returned the writ.—2. Roll. Abr. 563. 5. Co. 90. Lane, 52. 1. Salk. 409. 12. Mod. 394. and see the Case of Rowland *v.* Veale, Cowp. 20. in point.

THE CHIEF JUSTICE doubted, that for the second exception the plea was ill, for it ought to be on *a day certain*, and likewise it ought to be alledged *infra jurisdictionem*.

But THE OTHER THREE JUSTICES held the plea to be good *in omnibus*; and said, that the inferior court had a jurisdiction to issue out a writ, and the officer is excusable though the cause of action did not arise within the jurisdiction, which ought to be shewn on the other side.

And so judgment was given for the defendant.

An officer is justified in executing the process of an inferior court, although the cause of the plaint did not arise within the jurisdiction. Post. 195. 1. Freem. 322. Cowp. 18.

* [60]

* Snow and Others *against* Wiseman.

Case 46.

TRESPASS FOR THE TAKING OF HIS HORSE. The defendant pleads, that he was seised of such lands, and intitles himself to an *heriot*. The plaintiff replies, that another person was jointly seised with the defendant, *et hoc paratus est verificare*. The defendant demurs generally, Because the plaintiff should have traversed the *sole seisin*.

But it was said for him, that the sole seisin need not be traversed, because the matter alledged by him avoids the bar without a traverse. In a suggestion upon a prohibition for tythes, the plaintiff entitled himself by prescription under an abbot, and shews the unity of possession by the statute of 31. *Hen.* 8. c. 1. by which the lands were discharged of tythes. The defendant pleads, that the abbey was founded within time of memory, and confesseth the unity afterwards; and the plea was held good; for he need not traverse the prescription, because he had set forth the foundation of the abbey to be within time of memory, which was a sufficient

If the defendant alledge seisin of a manor, and thereon justifies for a heriot, and the plaintiff replies, that B. was jointly seised with him, he must traverse that the defendant was *sole seised*, or it will be bad on demurrer.

S. C. 1. Freem. 202. Post. 168. Kit. 229. Plowd. 230. 1. Leon. 77. 43. Yelv. 231. 1. Sid. 300. Savil, 86. Cro. Jac. 221. Stra. 444. 818. 237. Ld. Ray. 238. 3. Mod. 318. 5. Com. Dig. 111. 4. Bac. Abr. 70, 71.

 avoiding

Snow and Others against Wiseman.

avoiding the plaintiff's title, *Yelv.* 31. The plaintiff therefore having said enough in this case to avoid the bar, if he had traversed it also it would have made his replication naught, like the case of *Bedell v. Lull* (*a*); where, in an ejectment upon a lease made by *Elizabeth*, the defendant pleads, that before *Elizabeth* had any thing in the lands, *James* was seised thereof in fee, and that it descended to his son, and so derives a title under him, and that *Elizabeth* was seised by abatement. The plaintiff confesses the seisin of *James*, but that he devised it to *Elizabeth* in fee, and makes a title under her ABSQUE HOC that she was seised by abatement; and upon a demurrer the replication was held ill, because the plaintiff had made a good title before the devise to *James*, and so need not traverse the abatement.

But see the 16. & 17. *Car.* 2. c. 8. and the 4. & 5. *Ann.* c. 16.

THE CHIEF JUSTICE held, that the omitting of a traverse where necessary is matter of substance, and the concluding with *hoc paratus est verificare*, when it should be *et hoc petit quod inquiratur per patriam*, or *de hoc ponit super patriam*, or *vice versâ*, is matter of substance, and the wanting a traverse is of the same nature; and here the traverse of the sole seisin is necessary, because it is issuable: and of the same opinion were the other Judges (*absente* ELLIS); and therefore judgment was given for the defendant.

(*a*) Cro. Jac. 221.

*[61]

Case 47.

* Wilson *against* Ducket.

By the common law *corn in sheaves* could not be distrained for rent.

S. C. 1. Freem. 202.

TRESPASS FOR THE TAKING OF HIS CORN. The defendant pleads *not guilty* to all but three hundred and sixty sheaves made into stacks, which the defendant distrained for rent and services in arrear due to him. The plaintiff demurs, For that they could not be distrained in sheaves: a distress of them is lawful *damage feasant*, or in a cart for rent, but not here.

18. *Hen.* 3. pl 4. 2. *Hen.* 4. pl. 15. 11. *Hen.* 5. pl. 14. 22. *Edw.* 4. pl. 50. Co. Lit. 47. Roll. Abr. 667.

JONES, *Serjeant*. It is naught, because nothing is to be distrained but what may be known and returned in the same condition as when taken; and therefore *a replevin* will not lie of money out of a bag or chest; and in this case the corn cannot be returned in the same condition, because a great deal may be lost in the carrying of it home.

And of that opinion was ALL THE COURT (*a*).

Prec. Ch. 7, 8. 2. Vern. 129. 151. Comyns, 204. 10. Mod. 265. 12. Mod. 216. 397. 658. 662. Stra. 717. 851. 1040. 1272. Fort. 361. 2. Bac. Abr. 108.

(*a*) But now by 2. *Will.* & *Mary*, c. 5. s. 3. "Any person having rent in "arrear and due, upon any demise, "lease, or contract, whatsoever, may "seize and secure any sheaves or cocks "of corn, or corn loose or in the straw, "or hay lying or being in any barn or "granary, or upon any hovel, stack, or "rick, or otherwise upon any part of the "land or ground charged with such "rent, and to lock up or detain the "same in the place where the same "shall be found, for or in the nature of "a distress, until the same shall be re-"plevied, upon such security as de-"scribed in the act; and in default of "replevying the same, &c. the same "may be sold; so as such corn, grain, "or hay, be not removed to the damage "of the owner out of the place where "the same shall be found and seized; "but be kept there (as impounded) "until the same shall be replevied, or "sold in default of replevying the same, "within the time mentioned."

Curtis *against* Bourn.

Case 48.

IN WASTE, one tenant in common brings an action of waste alone.

Tenant in common ne d not join in an action of waste.

The question, upon the pleadings, was, Whether he should not have joined with his companion?

S. C. 3. Keb. 135. 175. 297. Lit. s. 314. Moor, 374. Co. Lit. 197. b. Cro. Eliz. 357. Yelv. 161. 12. Mod. 86. 96. 301. 657. Ld. Ray. 341. 737. 1. Com. Dig. 11.

SCROGGS, *Serjeant*, for an authority that they should join in this action, cited 2. *Roll. Abr.* 825. *pl.* 11. where it is said, that if a reversion be granted to two, and the heirs of one of them, yet they must join in an action of waste.

PEMBERTON, *Serjeant*, answered, That *Rolls* cited that case in his *Abridgment* out of the 1. *Inst.* 53. which seemed to be the opinion of LORD COKE, grounded upon the authorities there cited in the margin, which he said did not warrant any such opinion. The difference upon the Books is, Where one tenant in common demands an intirety, the writ shall abate; and therefore in the case of *Hill v. Hart*, where the plaintiff had only a third part of a reversion in common, it was held that he should not have an action of waste alone, because it would be very inconvenient that the third part should be delivered in execution. * It is true, they shall join in the personalty, where damages are to be recovered, but they shall always sever in the realty; and therefore in this case, *waste*, being a mixt action, and savouring of the realty, that being the more worthy, draws over the personalty with it, and therefore the action by one alone is good; but if they had made a lease for years, then they should have joined in an action of waste.

* [62]

And of that opinion was THE WHOLE COURT.

Anonymous.

Case 49.

THE question was, Whether *tout temps prist* is a good plea, after *a general imparlance?*

Tout temps prist cannot be pleaded after imparlance.

It was insisted for the plaintiff, That this plea was repugnant, because the imparlance proves the contrary. It is true, that in an action of debt upon a bond, such plea is good after an imparlance, because it is to save the penalty; and it is held in *Dyer*, 300. b. that *uncore prist* alone, without saying *tout temps*, in such case is good; though LEONARD, the *custos brevium*, who was a learned man, was there of another opinion. But when a single duty is demanded, and the party is entitled to damages for non-payment, in such case the plea of *tout temps prist* is not good.

Cro. Jac. 627. *contra*. 2. Show. 310. 1. Sid. 365. 1. Barnes, 149. 2. Barnes, 181. 269. 346. 10. Mod. 127. 282. 11. Mod. 2. 4. 12. Mod. 307. 529. 562. Tidd's Prac. 239. 241. 5. Com. Dig. "Pleader," (2 W 28). 4. Bac. Ab. 18. Ld. Ray. 254. Com. Prac. 153. Imp. Prac. 190.

And though it was objected, that the difference is, that the defendant after imparlance should not plead any thing contrary to the matter in the declaration to which he had imparled; as bastardy to an action brought by an heir, &c.; yet THE COURT were all of opinion, that the plea was not good, because it is inconsistent with the imparlance; for *petit licentiam interloquendi*, is no more in *English*, than for the defendant to say, *I will take time and resolve what to do*; which is contrary to being *always ready*.

HILARY TERM,

The Twenty-Seventh and Twenty-Eighth of Charles the Second,

I N

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*

Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.*
Sir William Ellis, *Knt.* } *Justices.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

* Stubbins *against* Bird and Others. Case 50.

If a plea contain matter *in bar*, and conclude in *abatement*, the defendant shall at his election have it taken *in bar* or in *abatement*.

IN AN ACTION OF TROVER AND CONVERSION, the plaintiff declared for taking six hundred load of ore.

The defendant pleads, That the plaintiff never had any thing in the said six hundred load of ore, *nisi conjunctim et pro indiviso* with two others; and so concludes in abatement.

The plaintiff replies, That *J. S.* was seised in fee of a close, in which this ore was digged; and being so seised, he died; after whose death the said close descended to *A.* and *B.* his two daughters and co-heirs; and that the plaintiff married one of them, and the other was also married: and so the plaintiff and the other husband and their wives were seised in right of their said wives of this close: That afterwards, and before the action brought, two thousand loads of lead ore were digged out of the said close, and laid there in heaps; and then a partition was made by deed of the said close and the ore, and one thousand loads were allotted to one

S. C. Free. 208. S. C. 1. Mod. 214. 1. Lev. 312. 2. Roll. Rep. 64. 6. Mod. 103. 1. Show. 4. 8. Mod. 43. 10. Mod. 11. 192. 12. Mod. 503. Gilb. Eq. Rep. 251, 252. Ld. Ray. 128. 337. 593. 694. 817. 1018. [illegible] 1. Bac. Abr. 15. 4. Bac. Abr. 50.

STURBINS against BIRD AND OTHERS.

sister and her husband, and the other thousand loads were allotted to the plaintiff; *per quod* he became *solus possessionat.* of the said one thousand loads in severalty; and being so possessed, the defendant found six hundred loads, parcel of the said one thousand loads, and converted it; ABSQUE HOC that the plaintiff had any thing after the partition *conjunctim* with any other person.

The defendant rejoins, That at the time of the conversion the plaintiff had nothing but *conjunctim* with the other, as before.

* [64]

The plaintiff demurred, For that the defendant ought to have *traversed* the partition; for though the possession was joint, the partition had made it several, by which the joint possession * was confessed and avoided, and therefore the traverse good; like the rule laid down in *Hob.* 104. in *Digby v. Fitzherbert*, Trespass *tali die*, the defendant confesses it, but pleads a release of all actions, and traverseth all trespasses after; so here the plaintiff hath traversed the joint possession after the partition.—SECONDLY, The rejoinder is *a departure* from the plea, which is, that the plaintiff never had any thing but jointly with others; and the rejoinder is, that at the time of the conversion he was jointly possessed; which is a manifest difference in point of time, and such as will make a departure: 33. *Hen.* 14. *Bro.* "*Departure*," 28. 13.

1. Roll. Rep. 20. 1. Leon. 309. Ld. Ray. 296. 692. 707.

HOPKINS, *Serjeant*, *for the defendant*, argued, That the replication was not good; for the plaintiff therein had alledged a partition by deed, and doth not say, *hic in curiâ prolatâ.* And in all cases where a man pleads a deed by which he makes himself either *party* or *privy*, he must produce it in court: as where the defendant justifies in trespass, that, before the plaintiff had any thing, one *Purifie* was seised in fee of the place WHERE, &c. and by indenture, &c. demised it to *Corbet*, excepting the wood, &c. HABENDUM for the life of *Ann*, and covenanted *quòd licitum foret* for the said *Corbet* to take house-bote, &c. that he assigned his interest to *Ann*, and that the defendant, as her servant, took the trees: and upon demurrer the plea was held naught, because (though a servant) having justified by force of a covenant, he did not shew the indenture. *Cro. Jac.* 291. *Purifie v. Grimes*, and *Bellamy's Case*, 6. *Co.* 38. If a thing will pass without a deed, yet if the party plead a deed, and make a title thereby, he must come with a *profert hic in curiâ* (*a*).—SECONDLY, As to the objection, that there was *a departure*, he argued to the contrary: for the defendant in his rejoinder insists only on that which was most material; and the plaintiff in his replication had given him occasion thus to rejoin; and though he had left out some of the time mentioned in the bar, yet that would not hurt the pleadings, because a fair issue was tendered; for if at the time of the conversion he was jointly seised, he could not be entitled to the action alone.

(*a*) 1. Leon. 309. 1. Roll. Rep. 20. Stiles, 549. 2. Show. 303. 6. Co. 38. Cro. Jac. 102. 3. Lev. 205.

NORTH.

North, *Chief Justice*, in the *Trinity Term* following, delivered the opinion of the Court, That the plea was good *in bar*, though pleaded *in abatement*, and the * defendant hath election to plead either *in bar* or *in abatement*. The nature of a plea in abatement is to intitle the plaintiff to a better writ; but here the defendant shews, that the plaintiff hath no cause of action, and so it shall be taken to be in bar: and it hath been expresly resolved, that where the plea is in *abatement*, if it be of necessity that the defendant must disclose matter of *bar*, he shall have his election to take it either by way of bar or abatement. 2. *Roll. Rep.* 64. *Salkil v. Shilton.* So where waste was brought in the *tenet*, the tenant pleads a surrender to the lessor, and demands judgment if he should be charged in the *tenet*, because it should have been in the *tenuit*; and this was held a good plea. 10. *Hen.* 7. *pl.* 11.

Stubbins *against* Bird and Others.

* [65]

Comyns, 157. 371. Fitzg. 269. 10. Mod. 208. 3. Peer. Wms. 349. 370. Stra. 816. Ld. Ray. 337. 593. 694. 1541.

Whereupon judgment was given for the defendant; the Chief Justice at first doubting about the departure, and advised the plaintiff to waive his demurrer, and to take issue upon payment of costs.

Daws *against* Harrison. Case 51.

Administration pleaded, and not *loci istius ordinarius*, good.

The plaintiff entitles himself as administrator to *Daws*; and shews, that administration was granted to him by the official of the *Bishop of Carlisle*, but did not alledge him to be *loci istius ordinarius*.

Cro. Jac. 556. Palm. 97. Sid. 322. Comyns, 17. 8. Mod. 244. 12. Mod. 21. 272. 10. Mod. 100. 385. 443. 537. 2. Barnes, 142. 1. Peer. Wms. 43. 767. Stra. 871. 2. Bac. Abr. 442.

Jones, *Serjeant*, demurred to the declaration, Because it did not appear that the official had any jurisdiction. *Pl. Com.* 277. a. 31. *Hen.* 6. *pl.* 13. *Fitz. Judg.* 35. 22. *Hen.* 6. *pl.* 52. 36. *Hen.* 6. *pl.* 32, 33.

Sed non allocatur; for the whole Court were of opinion, that the declaration was good, and that he shall be intended to have jurisdiction; but if it had been in the case of a peculiar, it cannot be intended that they have any authority, unless set forth: and so judgment was given for the plaintiff.

Mason *against* Cæsar. Case 52.

Commoner may abate hedges made upon his common.

Trespass for pulling down of hedges. The defendant pleads, that he had right of common in the place where, &c. and that the hedges were made upon his common, so that he could not *in eâ parte* enjoy his common *in tam amplo modo*, *&c.* and so justifies the pulling them down; and they were at issue, whether the defendant could enjoy the common *in tam amplo modo*, *&c.*; and there was a verdict for the * defendant: and judgment being stayed till moved on the other side,

1. Roll. Abr. 406. 1. Brownl. 228.

* [66]

2. Inst. 88. Bridg. 10. 2. Leon. 201. 3. Inst. 162. 204. 10. Mod. 185. Gilb. Eq. Rep. 183. Comyns, 341. 1. Vern. 32. 308. 456. 2. Vern. 103. 301. 356. 575. 2. Term Rep. 391.

Mason against Cæsar.

5. Co. 100. 9. Co. 55. Cro. Jac. 195. 222. 229.

Scroggs, *Serjeant*, moved in arrest of judgment, Because the plea was ill, and the issue frivolous; for it is impossible that he should have common where the hedges are; and therefore the defendant ought to have brought an action upon the case, or a *quod permittat*. He cannot abate the hedges, though he might have pulled down so much as might have opened a way to his common. The lord hath an interest in the soil, and a commoner hath no authority to do any thing but to enter and put in his beasts, and not to throw down quick-set hedges, for that is a shelter to his beasts.

2. Inst. 88.

But the Court were of opinion, that the defendant might abate the hedges, for thereby he did not meddle with the soil, but only pulled down the erection; and the Year-Book of 29. *Edw.* 3. *pl.* 6. was express in this point. *Vide* 17. *Hen.* 7. *pl.* 10. 16. *Hen.* 7. *pl.* 8. 33. *Hen.* 6. *pl* 31. 2. *Ass.* 12. And nothing was said concerning the plea, and so the defendant had judgment (*a*).

(*a*) In the case of Rex *v.* Wyvil and Others, Michaelmas Term 13. Geo. 2. an information was granted against *commoners* for a riot in pulling down fences. *Note to the* Fourth Edition.

Case 53. Hocket and his Wife *against* Stiddolph and his Wife.

An action by husband and wife for assault and battery, is cured by a verdict finding the battery on the wife only.

S. C. 1. Vent. 93. 328. S. C. 2. Vent. 29. March, 134. 1. Roll. Abr. 791. 1 Lev. 3. 2. Lev. 101. 8. Mod. 3. 26. 49. 200. 226. 240. 341. 10. Mod. 145 184. 210. 229. 300. 11. Mod. 264. 273. 12. Mod. 19. 207. 246. 364. 510. Fitzg. 174. 275. Stra. 61 229 726. 973. 977. 1006. 1011. 1094 Ld. Ray. 669. 1031. 1050. 1061. 1208. 5. Com. Dig. "Pleader" (C 87). 3. Term Rep. 627.

In an action of assault and battery brought by the plaintiff and his wife against the defendant and his wife, the jury find *quoad* the beating of the plaintiff's wife only, that the defendants are guilty, and *quoad residuum* they find for the defendants.

Scroggs, *Serjeant*, moved in arrest of judgment, That the declaration is not good, because the husband joins with the wife (*a*), which he ought not to do, upon his own shewing; for as to the battery made upon him, he ought to have brought his action alone; and the finding of the jury will not help the declaration, which is ill in substance.—And thereupon judgment was stayed.

But being moved again the next Term, the Court were all of opinion, that the declaration was cured by the verdict; and so judgment was given for the plaintiff.

(*a*) See Drury *v.* Dennis, Yelverton, 106. 1. Brownl. 209. 1. Sid. 376.

* Goodwin *Qui Tam, &c. against* Butcher. Case 54.

AN INFORMATION was brought upon the statute of 32. *Hen.* 8. c. 9. made against buying PRETENDED TITLES, which gives a forfeiture of the value of the land purchased, unless the seller was in possession within a year before the sale.

Buying a pretended title. Co. Lit. 369. 1. Leon. 166. Moor, 266. Goldf. 101. 4. Co. 26. 2. Anderf. 57. 10. Mod. 225. 4. Com. Dig. 202.

BARRELL, *Serjeant*, after verdict for the plaintiff, moved in arrest of judgment, Because the information had set forth the right of these lands purchased to be in *J. S.* and that the son of *J. N.* had conveyed them by general words, as descending from his father; which title of the son the defendant bought; whereas if in truth the title was in *J. S.* then nothing descended from the father to the son, and so the defendant bought nothing.

Sed non allocatur; for if such construction should be allowed, there could be no buying of a pretended title within the statute, unless it was a good title: but when it is said, as here, that the defendant entered and claimed *colore* of that grant or conveyance, which was void, yet it is within the statute.—So the plaintiff had his judgment.

Wine *against* Rider and Others. Case 55.

TRESPASS AGAINST FIVE, *Quare clausum fregerunt*, and took fish out of the plaintiff's several and free fishery. Four of them pleaded *not guilty*; and the fifth *justified*, For that one of the other defendants is seised in fee of a close adjoining to the plaintiff's close; and that he and all those, &c. have had the sole and separate fishing in the river which runs by the said closes, with liberty to enter into the plaintiff's close, to beat the water for the better carrying on of the fishing; and that he, as servant to the other defendant, and by his command, did enter; and so justified the taking; ABSQUE HOC that he is guilty *aliter vel alio modo*. The plaintiff replies, That he did enter *de injuriâ suâ propriâ*; ABSQUE HOC that the defendant's master hath the sole fishing. The defendant demurs.

In trespass against five for fishing in a several and free fishery, one of the defendants may plead property in his master, and that he did it by his command, and traverse the right of free-fishery stated in the declaration; and the defendant may reply, *de injuriâ suâ propriâ*.

NEWDIGATE, *Serjeant*, argued *for the defendant*, That the justification is good; for when he had made a * local justification, he must traverse both before and after, as he has done in this case. —SECONDLY, The plaintiff's replication is ill, for he ought not to have waived the defendant's traverse, and force him to accept of another from him; because the first is material to the plaintiff's title, and he is bound up to it, *Hob.* 104.—THIRDLY, There was no occasion of a traverse in the replication; for where a servant is defendant, *de injuriâ suâ propriâ* is good, with a traverse of the command.

* [68]

Cro. Jac. 45. 372. 4. Term Rep. 437.

BALDWIN, *Serjeant, on the plaintiff's side*, held the defendant's traverse to be immaterial; for having answered the declaration fully,

WINE *against* RYDER AND OTHERS.

fully, in alledging a right to the sole fishing, and an entry into the plaintiff's close, it is insignificant afterwards to traverse that he is guilty *aliter vel alio modo*. Then the matter of the plea is not good, because the defendant justifies by a command from one of the other defendants, who have all pleaded not guilty; and they must be guilty if they did command him, for a command will make a man a trespasser.

THE COURT were all of opinion, that judgment should be given for the plaintiff: for as to the last thing mentioned, which was the matter of the plea, they held it to be well enough; for the servant shall not be ousted of the advantage which the law gives him by pleading his master's command (*a*) —Then as to the replication it is good, and the plea is naught, with the traverse; for where the justification goes to a time and place not alledged by the plaintiff, there must be a traverse of both.—In this case, the defendant ought to have traversed the plaintiff's free-fishing, as alledged by him in his declaration; which he having omitted, the plea for that reason also is ill.

Hob. 104. Carter, 207. 1. Lev. 241. 4. Bac. Abr. 79.

And so judgment was given for the plaintiff.

(*a*) Mires *v.* Solebay, *post.* 243.

EASTER

EASTER TERM,

The Twenty-Eighth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*

Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.* } *Justices.*
Sir William Scroggs, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

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* Lee *against* Brown. Case 56.

IN A SPECIAL VERDICT IN EJECTMENT: The case was this, *viz.* There were lands which *re verâ* were not parcel of a manor, and yet were reputed as parcel. A grant is made of them nor and of all lands reputed parcel thereof.

A grant of a manor, and of all lands reputed parcel thereof, will pass lands that are not in fact parcel of the manor, if they are found to have been formerly parcel of the manor, and at the time of the grant were reputed so to be.

S. C. Pollexf. 410.
S. C. 1. Freem. 207.
Cro. Car. 308.
2. Roll. Abr. 186.
Dyer, 350.

The question was, Whether by this grant and by these general words those lands would pass which were not parcel of the manor?

NORTH, *Chief Justice*, now delivered the opinion of the Court, That those lands would pass; and they grounded their opinions upon two authorities in *Coke's Entries. fol.* 330. 384. *The King v. Imber and Wilkins.* If the jury had found that the lands in question had been reputed parcel of the manor, it would not have passed, had they found no more; because the reputation so found might be intended a reputation for a small time, so reputed by a few, or by such as were ignorant and unskilful. But in this case it is found that not only the lands were reputed parcel, but the reason why they were reputed parcel; for the jury have found that they were formerly parcel of the manor, and after the division they were again united in the possession of him who had the manor, which, being also copyhold, have since been demised by copy of court-roll together

Lee against Brown.

together with the manor; and these were all great marks of reputation.

And therefore judgment was given that the lands did well pass.

[70]

Case 57.

Wakeman *against* Blackwel.

Common recoveries, how to be pleaded.

S. C. 1. Mod. 218. Hob. 262. 10. Mod. 45. 124. Lutw. 1549. 5. Com. Dig. "Pleader" (3 A 8). Cowp. 346. 349.

QUARE IMPEDIT. The case was, The plaintiff entitled himself to an advowson by *a recovery* suffered by tenant in tail; in pleading of which recovery he alledges two to be tenants to the *præcipe*, but doth not shew how they came to be so, or what conveyance was made to them, by which it may appear that they were tenants to the *præcipe*.—And after search of precedents as to the form of pleading of common recoveries, THE COURT inclined that it was not well pleaded, but delivered no judgment.

Case 58.

Searl *against* Bunion.

In a justification for taking cattle *damage feasant*, it is sufficient to say, that he was *possessed* of a term of years, &c. without stating the *particular title*.

S. C. 1. Freem. 206. S. C. 3. Salk. 320. 1. Roll. Abr. 393. 1. Show. 7. 3. Mod. 132. 4. Mod. 419. 10. Mod. 37. 228. 300. 11. Mod. 219. 12. Mod. 509. Lutw. 1497. Stra. 6. 1238. Ld. Rav. 332. 334. 864. 923. 1230. Salk. 643. 2. Wilf. 261. 3. Wilf. 21. 65. 5. Com. Dig. "Pleader" (C 41). (E 19). (3 M 26). Morgan's Precedents, 638. 3. Term Rep. 147. 766.

TRESPASS FOR TAKING OF HIS CATTLE.—The defendant pleads, that he was possessed of BLACKACRE *pro termino diversorum annorum adtunc et adhuc ventur.*; and being so possessed the plaintiff's cattle were doing damage, and he distrained them *damage feasant*, *ibidem*; and so justifies the taking, &c.

The plaintiff demurs; and assigns specially for cause, That the defendant did not set forth particularly the commencement of the term of years, but only that he was possessed of an acre for a term of years to come; and regularly where a man makes a title to a particular estate, in pleading he must shew a particular time of the commencement of his title, that the plaintiff may reply to it.

NORTH, *Chief Justice*, and THE WHOLE COURT, held that the plea was good, upon this difference: Where the plaintiff brings an action for the land or doing of a trespass upon the land, he is supposed to be in possession; but if he will justify by virtue of any particular estate, he must shew the commencement of that estate; and then such pleading as here will not be good. But when the matter is collateral to the title of the land, and for anything which appears in the declaration the title may not come in question, such a justification as this will be good (*a*). In this case no man can tell what the plaintiff will reply; it is like the cases of inducements to actions, which do not require such

(*a*) Yelv. 75. Cro. Car. 138. *Contra* Lutw. 1493.

certainty

certainty as is necessary in other cases. * So where an action is brought for a nusance, and he entitles himself generally by saying he is *possessionat. pro termino annorum*, it is well enough, and he need not to set forth particularly the commencement, because he doth not make *the title* his case.

SHARE against BUNTON. Lut. 120. Cart. 30. Cro. Car. 539.

For this reason judgment was given for the defendant.

Crosier *against* Tomlinson, Executor. Case 59.

IN AN ACTION ON THE CASE the plaintiff declared, that the defendant's testator being in his life-time, *viz.* such a day, indebted to the plaintiff in the sum of twenty pounds for so much money before that time to his use had and received, did assume and promise to pay the same when he should be thereunto required; and that the testator did not in his life-time, nor the defendant since his death, pay the money, though he was thereunto required. The defendant pleads, that the testator did not at any time *within six years* make such promise. The plaintiff replies, that he was *an infant* at the time of the promise made, and that he came not to full age till the year 1672, and that within six years after he attained the age of one-and-twenty years he brought this action, and so takes advantage of the proviso in the statute of Limitations, 21. *Jac.* 1. c. 16. that the plaintiff shall have *six years* after the disability, by infancy, coverture, &c. is removed.—The defendant demurred.

The statute of the 21. *Jac.* c. 16. to limit personal actions, extends to an action of *indebitatus assumpsit*; for though *trespass* only is mentioned, yet all *actions on the case* are within the equity of the proviso. S. C. 1. Freem. 208. 1. Sid. 453. Lut. 243. 2. Saund. 120. Post. 311. 10. Mod. 206. 313. 11. Mod. 37. 12. Mod. 249. 444. 486. 568. 579. Stra. 550. 556. 719. 736. 836. 907. 1271. Fitzg. 81. 170. 289. Ld. Ray. 2. 153. 1. Com. Dig. 155. 533. 3. Bac. Abr. 513.

By RIGBY, *Serjeant*. The reason of his demurrer was, Because in the said proviso actions on the case on *assumpsit* are omitted. This act was made for quieting of estates and avoiding of suits, as appears by the preamble, and therefore shall be taken strictly: there is an enumeration of several actions in the proviso, and this is *casus omissus*, and so no benefit can be taken of the proviso. In a writ of error upon a judgment brought 4. *Car.* 1. in the court of *Windsor*, the Judges held, that an action on the case for slandering of a man's title is out of this act (*a*), because such an action was rare, and not brought without special damages. But HYDE, *Chief Justice*, doubted. 1. *Cro.* 141. The law-makers could not omit this case unadvisedly, because it is within those sorts of actions enumerated by this act. This promise was made to the plaintiff when he was but a day old, and it would be very hard now, after so many years, to charge the executor.

But TURNER, *Serjeant*, argued, That though an *indebitatus assumpsit* is not within the express words of the proviso, yet it is within the intent and meaning thereof; and so the rule is taken in *Bewsage's Case* (*b*), *quando verba statuti sunt specialia, ratio autem* *[72]

(*a*) Cro. Car. 163. 513. 535. Debt upon escape is out of the statute, 1. Saund. 37. but an action for escape is not, Sid. 305. so is debt for not setting out of tithes; for these are not grounded upon any contract. Cro. Car. 513. Hut. 109.—*Note to the* FOURTH EDITION.

(*b*) 10. Co. 101.

generalis,

CROSSE *against* TOMLINSON.

generalis, statutum intelligendum est generaliter. And this is a statute which gives a general remedy; and the mischief to the infant is as great in such actions of *indebitatus assumpsit* as other actions; and therefore it is but reasonable to intend, that the parliament, which hath saved their rights in debts, trovers, &c. intended likewise, that they should not be barred in an *indebitatus assumpsit.* In the case of *Smith v. Colshil* (*a*) debt was brought upon a bond; the defendant there pleaded the statute of the 5. *Edw.* 6. c. 16. of Selling of Offices; the words of which are, "That every bond to be given, for money or profit, for any office; "or deputation of any office mentioned in the statute, shall be void "against the maker." In that case the bond was given to procure a grant of the office, and also to exercise the same. Now though this was not within the express words of the statute, yet the bond was held void; and if it should be otherwise, the mischiefs which the statute intended to remedy would still continue; and therefore the intent of the law-makers in such cases is to be regarded: for which reason, if actions of *indebitatus assumpsit* are within the same mischief with other actions therein mentioned, such also ought to be construed to be within the same remedy. But he took the case of *Swain v. Stephens* (*b*) to rule this case at bar; in which case this very statute was pleaded to an action of trover; and the plaintiff replied, that he was beyond sea: and upon a demurrer to the replication, the Court held trover to be within the statute, it being named in the paragraph of limitation of personal actions, which directs it to be brought within the time therein limited; that is to say, all actions on the case within six years; and then enumerates several other actions, amongst which trover is omitted; yet the Court were then of opinion, that trover is implied in those general words.

See 1. Hawk. P. C. 313.

2. Anderf. 123. 150. Cro. Car. 533. 19. *Hen.* 8. 11. 10. Mod. 93. 115. 242. 408. 485.

And of that opinion was THE CHIEF JUSTICE, and WYNDHAM and ATKYNS, *Justices*, that upon the whole frame of the act it was strong against the defendant; for it would be very strange that the plaintiff in this case might bring an action of *debt*, and not an *indebitatus assumpsit.* * When the scope of an act appears to be in a general sense, the law looks to the meaning, and is to be extended to particular cases within the same reason; and therefore they were of opinion, that actions of trespass mentioned in the statute are comprehensive of this action, because it is a trespass upon the case; and the words of the proviso save the infant's right in actions of trespass. And therefore, though there are not particular words in the enacting clause which relate to this action, yet this proviso restrains the severity of that clause, and restores the common law, and so is to be taken favourably; and this action being within the same reason with other actions therein mentioned ought also to be within the same remedy.

2. Saund. 120. Mod. 270.

* [73]

8. Mod. 8. 11. Mod. 161. Ld. Ray. 150.

But ELLIS, *Justice*, doubted, whether actions of trespass could comprehend actions on the case; and that when the parliament

(*a*) 2. And. 55. (*b*) Cro. Car. 245.

had

had enumerated actions of trespass, trover, case for words, &c. If they had intended this action, they would have named it. He said, he was for restoring the common law as much as he could, but doubted much whether this proviso did help the plaintiff.

Croyser against Tomlinson.

But judgment was given for the plaintiff.

Doctor Samways *against* Eldsly.

Case 60.

COVENANT. The plaintiff declares, That by indenture made between him and the defendant, reciting, that there were divers controversies between them, as well concerning the right, title, and occupation of tithes arising and renewing upon the freehold of the defendant in *T.* and upon other lands held by the defendant, by a lease for years from the plaintiff, under the annual rent of, &c. and concerning the arrears of rent due upon that demise, as concerning other matters; for the determination thereof, the said parties did by the said indenture bind themselves, in consideration of twelve-pence given to each other, to observe the arbitration of an arbitrator, indifferently to be chosen between them, to arbitrate, order, and judge between them *de et super præmissis*; and the plaintiff and defendant mutually covenanted to do several other matters: That the arbitrator did thereupon afterwards award, and the defendant did covenant with the plaintiff, that in consideration of the plaintiff's sealing and delivering (at the defendant's * request) one part of a lease for years (to the award annexed) for the rent therein reserved, that the defendant should pay so much money for the tithes: That it was also awarded by the said arbitrator, and the defendant did covenant, that he would be accountable to the plaintiff for all such arrears of rent, tithes, and composition-money for tithes, as should be arising and renewing upon the said land, &c. according to such a value *per annum*, whereof the defendant could not lawfully discharge himself. And the plaintiff avers, that he hath observed all the covenants on his part, and that the defendant hath not observed all the covenants on his part; and assigns for breach, that he hath not accounted with him for all arrears of tithes, and composition-money for tithes arising upon the lands in, &c. and that he hath requested him to account, which he hath refused.

If *A.* covenant with *B.* to pay so much money for tithes, and to be accountable for all arrears of rent, and *B.* covenant to allow certain disbursements upon the account, *A.* cannot plead, in an action of covenant, that he was ready to account if *B.* would allow him the disbursements; for the covenants being *mutual*, each of them has remedy against the other for non-performance.

* [74]

Post. 203. 8. Mod. 40. 69. 105. 173. 294. 10. Mod. 455. 461. 503. Ld. Ray. 124. 664. 1242. 1419. Stra. 648. 712. 1. Com. Dig. 378. 3. Com. Dig. 159. See Howlet v. Strickland, Cowp. 56.

The defendant pleads *actio non*: for he says, that it is true, there was such an indenture as in the declaration is set forth, and such a covenant to be accountable as the plaintiff hath declared; but saith, *in eâdem indenturâ agreatum fuit ulterius et provisum*, that the plaintiff should allow and discount upon the account, all sums of money for parson's dinners, at the request of the plaintiff, and for his concerns laid out and disbursed by the defendant, and such other sums which he had direction to lay out; and that such a day *paratus fuit et obtulit se et adhuc paratus est*, to account for all arrears of rent, &c. if the plaintiff would discount, &c.: That such a day the plaintiff would not, and often after refused, and yet doth

DE SAMWAYS *against* EASLY.

refuse, to allow upon such account all such sums of money as the defendant, at the request and for the concerns of the plaintiff, had laid out; and this he is ready to verify. And then he avers, that after, &c. on such a day, he did expend several sums of money for the plaintiff, which were just and reasonable to be allowed by the plaintiff upon account made by him.

To this plea the plaintiff demurred, and the defendant joined in demurrer.

TURNER, *Serjeant*, *for the plaintiff*. This was a bad plea; for it is a rule in all law-books, that every plea ought to answer the matter which is charged upon the defendant in the declaration; which is not done here, * because the defendant doth neither aver that he did account, or confess and avoid, or traverse it, which he ought to do after the plaintiff had alledged a request to account, and a refusal. It is an absolute covenant, which charges him to be accountable, and not conditional, "if the plaintiff would allow parson's "dinners, &c.;" for it is impossible that the plaintiff can make any such allowance till the defendant hath accounted; for how can there be a discounting without an account? If the plaintiff had told him before the account, that he would not allow anything upon the account, this would not have been prejudicial to bar him of his action, so as it had been before the request: for if a man make a feoffment in fee, upon condition that if the feoffor pay a hundred pounds at *Michaelmas* the feoffment shall be void, and before *Michaelmas* the feoffee tells him that he will not receive the money at that time, this shall not prejudice him, because it is no refusal in law. The defendant in this case is to do the first act, *viz.* to account; and when that is neglected by him, it shall never prejudice him who is to do a subsequent act. 5. *Co.* 19, 20. *Higginbottom's Case*; and the case of *Hallin v. Lamb*, 5. *Co.* 22, 23. One covenants to make an estate in fee at the costs of the covenantee; the covenantor is to do the first act, *viz.* to let him know what conveyance he will make. The like case was in this court, between *Twyford and Buckly*, upon an indenture of covenants, wherein one of the parties did covenant to make a lease for the life of the covenantee, and for two other lives as he should name, and the covenantor was to give possession. The breach assigned was, that the defendant had not made livery and seisin; and upon performance pleaded the plaintiff did demur; and upon great debate it was resolved, that the covenant was not broken, because the plaintiff had not performed that which was first to be done on his part, *viz.* to name the lives. It may be objected, that these covenants have a relation one to the other, and so non-performance of the one may be pleaded in bar to the other. But to that he answered, they are distinct and mutual covenants, and there may be several actions brought against each other. The case of *Ware v. Chappel* (*a*) comes up to this point. *Ware* was

* [75]

See 2. Com. Dig. tit. "Condition" (H).

5. Com. Dig. "Pleader" (C. 54).

(*a*) Stiles. 186.

to raise five hundred soldiers, and bring them to such a port, and *Chappel* was to find shipping; for which he sued upon the covenant, though the other had not raised the soldiers; for that can be only alledged in mitigation of damages, and is no * excuse for the defendant: and it was adjudged, that this was not a condition precedent, but distinct and mutual covenants, upon which several actions might be brought. This cannot be a condition precedent; for the defendant pleads, *et ulterius agreatum et provisum est* that the plaintiff shall discount and re-imburse the defendant; and here the words *provisum est* doth not make a condition but a covenant. 27. *Hen.* 8. *pl.* 14, 15. *Bro.* "*Condition*, 7.—There is another fault in the plea; for the defendant avers, that the plaintiff hath not reimbursed him several sums of money, which is altogether incertain, for it doth not appear what is due. 28. *Hen.* 8. *Dyer*, 28. 9. *Edw.* 4. *pl.* 16. 12. *Hen.* 8. *pl.* 6. a.

DR. SAMWAYS *against* ELDSLY.

* [76]

But SEYS, *Serjeant*, argued *for the defendant*, that he need not traverse the account. As to the first objection made, that the plea is not good, because it doth not answer the declaration, the rule as to that purpose is generally good; but then the plaintiff must tell all his case; which if he omit, he must then give the defendant leave to tell where his omission is. Sometimes a thing which belongs properly to another may be pleaded in bar or discharge, to avoid circuity of actions; as one covenant may be pleaded to another. 1. *Hen.* 7. *pl.* 15. 20. *Hen.* 7. *pl.* 4. So where the lessee is to be dispunishable of waste, he may plead it to a writ of waste. The Books note a difference where the covenant is one or two sentences; for in the first case one covenant may be pleaded in discharge of another, but not in the last. *Keilway*, 34. It is true, if the second covenant had been distinct and independent, it could not have been thus pleaded; but in this case it is not said, that the covenantor, "for himself, his executors, and administrators, doth covenant, &c." but, "*ulterius agreatum et provisum est*;" so that, as it is penned, "*provisum est*" makes a condition; and then the sense is, "I will account if you will discount; and if you refuse to discount, I cannot be charged." *Dyer*, 6. It is *inutilis labor* to make up an account, if the other will not allow what he ought: if there be an annuity *pro consilio impenso*, *&c.* and he will not pay the money, the other is not to be compelled to give his advice. *Fitzh.* "*Annuity*," 27. 25. *Edw.* 2. "*Annuity*," 44.

THE CHIEF JUSTICE and THE WHOLE COURT were of opinion, that judgment should be given for the plaintiff; for arbitrations, wills, and acts of parliament, are to be taken according to the * meaning of the parties, and damages are to be given according to the merits of the case. In this case the defendant is bound to account upon request, and to pay what money is due upon the account; and it is an impertinent question for the defendant to ask him to make allowance for parson's dinners before they come to account. It is as if a bailiff should say to his lord, "I have laid out so much money, and I will not account with you

* [77]

 "unless

Dr. Samways against Eldsly.

"unless you will allow it;" this is a capitulation beforehand, and is very insignificant by way of discharge. They have each a remedy upon these mutual covenants, and the *provisum et agreatum est* doth not amount to *a condition*, but is *a covenant*.

And judgment was given accordingly.

Ellis, *Justice*, said, he had a manuscript report of the case of *Ware v. Chappel*, which he said was adjudged upon great debate.

Case 61.

Stoutfil's Case.

Brick not titheable.
2. Inst. 651.
1. Mod. 35.
Pigeons not titheable.

PROHIBITION. It was agreed clearly, that no tithes ought to be paid for *brick*, because it is part of the soil: and so it has been often adjudged.

And it was also said, that tithes shall not be paid for *pigeons*, unless it be by special custom.

Case 62.

Columbel *against* Columbel.

If a submission to arbitration provide "that the award be "in writing "under *hand* "and *seal*," the pleading such award under *seal* only is bad.
Palm. 109. 112. 121.
2. Roll. Rep. 243.
1. Bulst. 110.
Cro. Jac. 278.
Stra. 116.

THE PLAINTIFF brought an action of debt upon a bond of five hundred pounds. The defendant demands *oyer* of the bond and condition; which was, to observe an award of *A. B.* arbitrator indifferently chosen to determine all manner of controversies, quarrels, and demands concerning the title of certain lands, so as the said award be made and put into writing *under the hand and seal* of the arbitrator, &c.; and then he pleads, that the arbitrator made no award.—The plaintiff replies, "an award" by which such things were to be done, and sets it forth *(in hæc verba)* under *the seal* of the arbitrator.—The defendant rejoins, that the arbitrator made no award under his *hand and seal*, according to the condition of the bond.—The plaintiff demurs, FOR THAT the defendant ought to plead the award under *the hand* as well as *the seal* of the arbitrator; * for when he produces it in court, as he doth by a *profert hic in curiâ*, he must plead it formally, as

* [78] well as produce it.—And judgment was given for the plaintiff.

Ld. Ray. 763
967. 1126. 1206. 1536 1. Com. Dig. 394. Kyd on Awards, 195.

Case 63.

Norris *against* Trist.

Livery *secundum formam chartæ*, where good.
S. C. 3. Salk. 277.

A SPECIAL VERDICT IN EJECTMENT—The case was, A deed is made to three, HABENDUM to two for their lives, remainder to the third for his life, and livery and seisin is made to all three *secundum formam chartæ*.

Dyer, 131. 1 Sid. 428. Gilb. Eq. Rep. 137. 166. Fitzg. 156. 214. 220. 8. Mod. 68. 249. 292. 381. 10 Mod. 31. 72. 466. 12. Mod. 147. 469. 564. Prec. Ch. 256. 293. 452. 474. 2. Wms. 2[illegible]. 489. 506. (623). (648). Cases Temp. Talb. 72. 93. Stra. 596. 601. 604. 66[illegible] 605. 992. Ld. Ray. 166. 193. 660. 908. 1198.

The

The queſtion was, Whether the livery ſo made as if they had all eſtates in poſſeſſion, whereas in truth one of them had but an eſtate in remainder, was good?

SEYS, *Serjeant*, on the one ſide ſaid, That poſſeſſion in this caſe was delivered according to the form of the deed within mentioned, which muſt be to two for life, remainder to the third perſon; and livery and ſeiſin being only to accompliſh and perfect the common aſſurances of the land, ought to be taken favourably, *ut res magis valeat quàm pereat*; and therefore if a feoffment be made of two acres, and a letter of attorney to give livery, and the attorney only enter into one acre, and give livery *ſecundum formam chartæ*, both the acres paſs, *Co. Lit.* 52. a.

MAYNARD, *Serjeant*, on the other ſide ſaid, That there was ſomething more in this caſe than what had been opened; for there was a letter of attorney made to give livery to two, and inſtead of doing that he makes livery to them all; which is no good execution of his authority, and therefore no livery was made, the authority not being purſued. As to the caſe in the *Firſt Inſtitute*, my LORD COKE errs very much there in that diſcourſe; for in ſaying, that if there be a feoffment of two acres, and a letter of attorney to take poſſeſſion of both, and he make livery of both, but take poſſeſſion but of one, and that both paſs, it is not law; but if the authority be general, as to make livery and ſeiſin, and he take poſſeſſion of one, and then make livery of more *ſecundum formam chartæ*, that is good; and this is the difference taken in THE YEAR-BOOKS 5. *Edw.* 3. *pl.* 65. 3. *Edw.* 3. *pl.* 32. 43. *Edw.* 3. *pl.* 32. 27. *Hen.* 8. *pl.* 6. The remainder-man in this caſe is a mere ſtranger to the livery. * There is alſo a manifeſt difference between a matter of intereſt and the execution of an authority; for in the firſt caſe it ſhall be conſtrued according to the intereſt which either hath, but an authority muſt be ſtrictly purſued. [79]

THE COURT were all of opinion, that the livery in this caſe was good to two for their lives, remainder to the third perſon.

And the CHIEF JUSTICE ſaid, that whatever the ancient opinions were about purſuing authorities with great exactneſs and nicety, yet this matter of livery upon indorſements of writing was always favourably expounded of later times, unleſs where it plainly appeared that the authority was not purſued at all; as if a letter of attorney be made to three jointly and ſeverally, two cannot execute it, becauſe they are not the parties delegated; they do not agree with the authority.

And judgment was given accordingly.

 Richards

Case 64. Richards *against* Sely.

If a copyholder, to secure a person who has become bound for him, covenant, that such person shall hold and enjoy the copyhold estate for seven years, and so from seven years to seven years, for and during the term of forty-nine years, if the copyholder should so long live, it is a forfeiture of the estate, although there is a clause that the deed should be void on the bond being paid; for this deed, though intended only as a collateral security, amounts to a present lease.

THIS was a special verdict in ejectment for lands in the county of *Cornwall*. The case was this, *viz*. *Thomas Sely* was seised of the lands in question for life, according to the custom of the manor of *P*. and he together with one *Peter Sely* were bound in a bond to a third person for the payment of one hundred pounds, being the proper debt of the said *Thomas*, who gave *Peter* a counter-bond to save himself harmless; and that *Thomas* being so seised did execute a deed to *Peter*, as a collateral security to indemnify him for the payment of this hundred pounds; by which deed, after a recital of the counter-bond given to *Peter*, and the estate which *Thomas* had in the lands, he did "covenant, grant, and agree, for "himself, his executors, administrators, and assigns, with the said "*Peter*, that he, his executors and administrators, should hold and "enjoy these lands from the time of the making of the said deed for "seven years, and so from the end of seven years to seven years, for "and during the term of forty-nine years, if *Thomas* should so long "live:" in which deed there was a covenant, that if the said hundred pounds should be paid, and *Peter* saved harmless, according to the condition of the said counter-bond, then the said deed to be void.

The question was, Whether this being in the case of copyhold lands, will amount to a lease thereof, and so make a forfeiture of the copyhold estate, there being no custom to warrant it?

* [80]

S.C. 3. Keb 638. Ante, 33. Co. Lit. 59. 9. Co. 95. Cro. Jac. 301. 308. 403. Moor, 272. Cro. Eliz 499. 1. Ro. Ab. 507. 1. Bulst. 190. 215. Cro Car. 233. 207. Hob. 276. Gilb. Eq. Rep. 198 166. Stra 447. 1 Peer. Wms. 16.71 330.721. 3. Bac. Abr. 402, 403 423. 2. Ter. Rep. 425. Cro. Jac. 172. 2. Ro. Ab. 847. Winch's Ent. 119. Hob. 34.

* This case was argued this Term by PEMBERTON, *Serjeant*, *for the plaintiff*, and in *Trinity Term* following by MAYNARD, *Serjeant*, on the same side, who said, that this was not a good lease to entitle the lord to a forfeiture. It hath been a general rule, that the word "covenant" will make a lease, though the word "grant" be omitted. Nay, a licence to hold land for a time without either of those words will amount to a lease, much more when the words are, "to have, hold, and enjoy," his land for a term certain; for those are words which give an interest; and so it hath been ruled in the case of *Tisdale v. Sir William Essex*, which is reported by several (*a*), and is in *Hob.* 35.; and it is now settled, that an action of debt may be brought upon such a covenant. And all this is regularly true in the case of a freehold: but if the construing of it to be a lease will work a wrong, then it is only a covenant or agreement, and no interest vests; and therefore it shall never be intended a lease in this case, because it is in the case of a copyhold estate; for if it should, there would be a wrong done both to the lessor and lessee; for it would be a forfeiture of the estate of the one, and a defeating of the security of the other. It has been generally used in such cases to consider what was the intention of the parties, and not to intend it a lease against their meaning; for which there is an express authority in the case

(*a*) Moor, 861. 3. Bulst. 204. 1. Browml. 23. 1. Roll. Rep. 397.

of *Evans v. Thomas*, *Cro. Jac.* 172. in which *Howel* covenants with *Morgan* to make a conveyance to him of land by fine, provided, that if he pay *Morgan* one hundred pounds at the end of thirteen years that then the use of the fine shall be to the cognizor; and covenants, that *Morgan* shall enjoy the said lands for thirteen years, and for ever after, if the hundred pounds be not paid; the assurance was not made: and this was adjudged no lease for thirteen years, because it was the intent of the parties to make an assurance only in the nature of a mortgage, which is but a covenant. And this appears likewise to be the intention of the parties here, because in the very deed it is recited that the lands are copyhold. It also sounds directly in covenant; for it is, that *Peter* "shall or "may enjoy without the lawful let or interruption of the lessor." All agreements must be construed *secundum subjectam materiam* if the matter will bear it, and in most cases are governed by the intention of the parties, and not to work a wrong; and therefore if tenant in tail make a lease for life, it shall be taken for his own life; and yet if, before the statute of entails, he made such * lease, he being then tenant in fee-simple, it had been an estate during the life of the lessee; but when the statute had made it unlawful for him to bind his heir, then the law construes it to be for his own life, because otherwise it would work a wrong. *Co. Lit.* 42. So in this case it shall not amount to a lease, for the manifest inconveniency which would follow; but it shall be construed as a covenant, and then no injury is done.

RICHARDS against SALY.

[81]

NEWDIGATE, *Serjeant*, *on the defendant's part*, argued, That though this was in the case of a copyhold, that did not make any difference; for the plain meaning of the parties was to make a lease: but where the words are doubtful, and such as may admit of diverse constructions, whether they will amount to a lease or not, there they shall be taken as a covenant to prevent a forfeiture. So also if they are only instructions; as if a man by articles sealed and delivered is contented to demise such lands, and a rent is reserved, and covenants to repair, &c.; or if one covenant with another to *permit* and *suffer* him to have and enjoy such lands; these and such like words will not amount to a lease, because (as hath been said) the intention of the parties is only to make it a covenant; but here the words are plain, and can admit of no doubt. But for an authority in the point the *Lady Mountague's Case* (a) was cited; where it was adjudged, that if a copyholder make a lease for a year warranted by the custom, *et sic de anno in annum* during ten years, it is a good lease for ten years, and a forfeiture of the copyhold estate. *Vide Hilary Term*, 15. & 16. *Car.* 2. *Roll* 233. the case of *Holt v. Thomas* in this court.

1. Roll. Abr. 848. 3. Bulst. 25. 3. Bac. Abr. 405. 422.

1. Roll. Abr. 508. 1. Bulst. 190. 3. Bac. Abr. 404.

THE COURT inclined, that it was a good lease, and by consequence a forfeiture of the copyhold; and that a licence in this case could not be supposed to prevent the forfeiture; because if that had

(a) Cro. Jac. 301.

RICHARDS against SELY.

been, the jury would have found it. The meaning of the parties must make a construction here; and that seems very strong that it is a good lease. But they gave no judgment.

* [82]

Case 65.

* Wilkinson *against* Sir Richard Lloyd.

If *A.* covenant not to do an act without the consent of *B.* and *C.* each of the covenantees may maintain an action for his particular damages.

S. C. 3. Keb. 638. 1. Sid. 189. 8. Mod. 166. Stra. 503. 553. 810. 1146. Ld. Ray. 1203. 1. Salk. 393. 2. Burr. 1190. Cowp. 56.

THE DEFENDANT covenanted, that he would not agree for the taking the farm of the excise of beer and ale for the county of *York* without the consent of the plaintiff and another: and the plaintiff alone brought this action of covenant; and assigns for breach, the defendant's agreeing for the said excise without his consent: upon which the plaintiff had a verdict, and one thousand pounds damages given.

PEMBERTON, *Serjeant*, moved in arrest of judgment, For that an action of covenant would not lie in this case by the plaintiff alone, because he ought to have joined with the other, both of them having a joint interest; and so is *Slingsby's Case*, 5. *Co.* 18. If a bond be made to two jointly and severally, they must both join in an action of debt; so here it is a joint contract, and both must be plaintiffs: so also if one covenant with two to pay each of them twenty pounds, they must both join. It is true, in *Slingsby's Case* it was held, that if an assurance be made to *A.* of *Whiteacre*, and to *B.* of *Blackacre*, and to *C.* of *Greenacre*, and a covenant with them "and every of them," these last words make the covenant several. But here is nothing of a several interest, no more than that one covenants with two, that he will not join in a lease without their consent; so that their interest not being divided, the covenant shall be entire, and taken, according to the first words, to be a joint covenant; and the rather, because if the plaintiff may maintain this action alone, the other may bring a second action, and the defendant will be subject to entire damages, which may be given in both.

But THE COURT was of another opinion, that here was no joint interest, but that each of the covenantees might maintain an action for his particular damages, or otherwise one of them might be remediless: for suppose one of them had given his consent that the defendant should farm this excise, and had secretly received some satisfaction or recompence for so doing, is it reasonable that the other should lose his remedy who never did consent?—For this reason the plaintiff had his judgment.

[83]

Case 66.

* Page *against* Tulse and Another, Sheriffs of Middlesex.

An action on the case lies not against the sheriff for returning a "cepi corpus et paratum habeo," though the party do not appear.—S. C. 1. Mod. 239. Cart. Freem. 209. 225. Ante, 31. Post. 177. 180. 1. Roll. Abr. 92, 93. 807. Cro. Eliz. 624. Moor, 428. 2. Saund. 60. 1. Lev. 86. 8. Mod. 110. 342. 11. Mod. 49. Mod. 318. 447. 485 414. 516. 527. 557. 579. 604. 1. Peer. Wms. 687. 1. Salk. 99. Com. Dig. "Bail" (K. 5.). Tidd's Practice, 105. 111. 4. Bac. Abr. 462. 1. H. Bl. Rep. 468.

THE plaintiff brought an action on the case against the sheriff for *a false return*, setting forth, that he sued a *capias* out of this court directed to the sheriff of *Middlesex*, by virtue whereof he

PAGE against TULSE AND ANOTHER, SHERIFFS OF MIDDLESEX.

he arrested the party, and took bail for his appearance; and at the day of the return of the writ the sheriff returned, *cepi corpus et paratum habeo*; but he had not the body there at the return of the writ, but suffered him to escape. The defendant pleads the statute of 23. *Hen.* 6. c. 10. and saith that he took bail, *viz.* two sufficient sureties, and so let him go at large, &c. The plaintiff demurs.

The question was, Whether this action lies against the defen- *dant at the suit of the plaintiff, who refused to proceed against him by way of amerciament, or to take an assignment of the bail-bond?

This case depended in court several Terms. It was argued by PEMBERTON and CONIERS, *Serjeants, for the plaintiff*, and by GEORGE STRODE, *Serjeant, for the defendant*; and judgment was given in *Easter Term* in the twenty-ninth year of this king.

In the argument for the defendant, that this action would not lie, it was considered, FIRST, What the common law was before the making of this statute.—SECONDLY, What alteration thereof the statute had made.—FIRST, At the common law men were to appear personally to answer the writ, the form of which required it; and no attorney could be made in any action till *Edward the First de gratiâ speciali* gave leave to his subjects to appoint them, and commanded his Judges to admit them, 2. *Inst.* 377. After the arrest the sheriff might tie the party to what conditions he pleased, and he might keep him till he had complied with such conditions, which often ended in taking extravagant bonds, and sometimes in other oppressions; for remedy whereof this statute was made, in which the clause that concerns this case is, "If the "sheriff return upon any person *cepi corpus* or *reddidit se*, that he "shall be chargeable to have the body at the day of the return of "the writ in such form as before the making of the act;" so that as to *the return* of the writ this statute hath made no alteration, the sheriff being bound to have the party at a day as before. * All the alteration made of the common law by this statute is. that the sheriff now is bound to let the party out of prison upon reasonable sureties of sufficient persons, which before he was not obliged to do; and it would be a case of great hardship upon all the sheriffs of *England*, if they (being compellable to let out the party to bail) should also be subject to an action for so doing, because they have him not at the day; so that the intent of the law must be (when it charges the sheriff to have the body at the return), that he should be liable to a penalty if the party did not then appear, not to be recovered by action, but by amerciament. The security directed by this act is to be taken in the sheriff's own name (*a*); it is properly his business, and for his own indemnity, and therefore it is left wholly in his power; for which reason no action will lie against him for taking insufficient bail, that being to his own prejudice, in which the plaintiff is nowise concerned; for if that had been intended by the act, some provision would * [84]

(*a*) Cro. Jac. 286.

have

have been made as to his being ſatisfied in the ſufficiency of the perſons. When the ſecurity is thus taken, if the defendant do not appear at the return of the writ, the plaintiff by amerciaments ſhall compel him to bring in the body, or to aſſign the bond, either of which is a full ſatisfaction, and as much as is required. If the ſheriff refuſe to take ſufficient ſureties when offered, he is liable to an action on the caſe at the ſuit of the defendant for his refuſal (*a*); and it would be very unreaſonable to enforce him to have the party in court at the return, when he is obliged, under a penalty, to let him at large. This action is grounded upon a falſe return, when in truth there is no return made, or, if any, it is a very imperfect return till the body be in court; and this is the reaſon why the Court will not allow it, but amerce the ſheriff till he make the party appear: it is not like a complete return, as a *non eſt inventus*, or the return of *nulla bona* upon a *fieri facias*. The caſe of *Bowles v. Laſſels* (*b*) is full in the point, where it was adjudged, that this action would not lie, becauſe the ſheriff had not done anything unjuſtly, but what he was commanded to do by the ſtatute; and therefore he is to be amerced, if the defendant do not appear.

BUT *for the plaintiff* it was ſaid, That unleſs this action lie he is remedileſs, and that for two reaſons:—FIRST, Becauſe the aſſignment of the bail-bond is at the diſcretion of the Court, and
[85] not demandable by the plaintiff *in foro* (*c*).—SECONDLY, * The plaintiff hath no benefit by the amerciaments, becauſe they go to the king, and in ſome places are granted to patentees. Now it is agreed, that the ſheriff may be amerced; and certainly if an action be brought againſt him he is but in the ſame caſe, for ſtill he is to pay: and if it be objected, that the amerciaments may be compounded cheaper, then the plaintiff hath not ſo good remedy, nor is ſo likely to recover his debt, as if the action would lie, which would be a greater penalty upon him than the amerciaments on the ſheriff. Neither will it follow, that becauſe the ſheriff may be amerced, therefore no action will lie againſt him; for in many caſes he may be amerced, yet an action on the caſe will lie againſt him at the ſuit of the party. 41. *Aſſ. pl.* 12 *fol.* 254. *Latch.* 187. That this action will not lie, is againſt the very end of the ſtatute, and the reaſonable conſtruction thereof in the laſt clauſe, which enacts, "that if the ſheriff return a *cepi corpus*, he "ſhall be charged to have the body at the return, as before the "making of the ſtatute." Now, before this law he was liable to an action, if after ſuch a return made the party did not appear; and therefore this action, being grounded upon the common law, is ſtill preſerved, ſince no alteration hereof hath been made by this ſtatute. It is true, an action of *eſcape* is taken away, but not an action on the caſe for *a falſe return*; and upon this difference are

(*a*) 1. Roll. Abr. 807. Moor, 428. 1. Sid. 23. Cro. Eliz. 460. 852. 2. Saund. 59. 154.

(*b*) 1. Roll. Abr. 93. pl. 17. Cro. Eliz. 852.

(*c*) See 4. & 5. *Ann.* c. 16. ſ. 20.

all

all the authorities cited on the other side; as *Cro. Eliz.* 416. 621. *Cro. Jac.* 286. *Moor*, 428. and the case of *Bowles v. Lassels.* And for an authority in point is the case of *Franklin v. Andrews*, 24. *Car.* 1. (*a*), where judgment was given for the plaintiff in an action brought for a false return of *cepi corpus*, and the statute pleaded, as in this case. It has been objected, that judgment was there given upon the defect of pleading, because the traverse was naught: it is true, there was a traverse, ABSQUE HOC *quod* the defendant *retornavit aliter vel alio modo*; but that was held good, because it answered the *falsò* alledged in the plaintiff's declaration. In this case there is no traverse, but it is confessed by the demurrer that he did falsely and deceitfully return *cepi corpus*, and so the plaintiff is at apparent damage, and hath no remedy without this action; and the defendant is at no prejudice, but hath his remedy over on the bail-bond.

PAGE *against* TULSE AND ANOTHER, SHERIFFS OF MIDDLESEX.

Ld. Ray. 231.

NORTH, *Chief Justice*, WYNDHAM and ATKINS, *Justices*, held, that the action would not lie; for when the sheriff returns *cepi corpus et paratum habeo*, though he have him not in court, it is * no false return; for if he hath taken bail, he hath done what by law he ought to do. If he arrest a man in *Yorkshire*, the law will not compel him to bring the party hither to the bar, because of the charge. If he make an insufficient return, neither the party nor the court are deluded, because the common method in such cases must be pursued, by which the party will have remedy. This return is true.

* [86]

12. Mod. 494.

And ATKINS, *Justice*, held, that the sheriff was not obliged by the statute to return only a *cepi corpus et paratum habeo*, but might return that he took bail; for the statute provides, that if he return a *cepi corpus* he shall be chargeable as before, but doth not enjoin him to make such return; the case of *Bowles v. Lassels* is full in this point.

And therefore judgment was given for the defendant.

But SCROGGS, *Justice*, was of another opinion; for, he said, this action being brought because the defendant said he had the body ready, when in truth he had not, was an apparent injury to the plaintiff, of whom the statute must have some consideration; for it doth not require the sheriff to say, *cepi corpus et paratum habeo*, but he must make his return good, or otherwise those words are very insignificant; and if the statute oblige him to let the party to bail, and nothing more is thereby intended for the benefit of the plaintiff, Why doth the Court amerce the sheriff, and punish him for doing what the statute directs? Therefore if the plaintiff bring a *habeas corpus* upon the *cepi*, and the defendant do not appear, the plaintiff is then well intitled to this action.

(*a*) See 1. Mod. 33. 57.

EASTER

EASTER TERM,

The Twenty-Eighth of Charles the Second,

IN

The Chancery.

Sir Heneage Finch, *Knt. Lord Chancellor.*
Sir Harbottle Grimſtone, *Knt. Maſter of the Rolls.*

Hollis *againſt* Carr. Caſe 67.

FINCH, *Lord Chancellor*, having called to his aſſiſtance WYLDE and WYNDHAM, *Juſtices*, to give their opinions what relief the plaintiff was to have for the recovering of ſix thouſand pounds, which was his lady's portion;—after thoſe Judges had ſpoken ſhortly to the matter, he put the following caſe:

The plaintiff by his bill demands ſix thouſand pounds, due to him for his wife's portion, with intereſt for non-payment, according to the purport of certain articles of agreement, dated in *Auguſt* 1661, and mentioned to be made between old *Sir Robert Carr* (the defendant's father), his lady, and his ſon (the now defendant), and *Lucy Carr* his daughter, on the one part; and my *Lord Hollis* and *Sir Francis* his ſon (the now plaintiff), on the other part. * The articles mention an agreement of a marriage to be had between the ſaid *Sir Francis Hollis* and *Lucy Carr*, with covenants on the plaintiff's ſide to ſettle a jointure, &c. and on the other ſide to pay ſix thouſand pounds; and it is agreed in the articles, that a fine was intended to be levied of ſuch lands, &c. for ſecuring the payment of the ſix thouſand pounds. The marriage takes effect, but old *Sir Robert Carr* did never ſeal theſe articles; the *Lady Carr* ſeals before, and the defendant after marriage. *Sir Francis* had

Articles of agreement reciting an intended marriage, covenanting to ſettle a jointure in conſideration of a marriage-portion, and concluding thus; "and it is "hereby agreed "that a fine "ſhall be levied to ſecure "the payment "of the ſaid "portion," amount to a *covenant* to levy the fine; and the court of chancery may decree the execution of it *in ſpecie*.—S. C. Finch C. R. 261. S. C. 2. Freem. 3. Co. Lit. 139. 1. Roll. Abr. 518. Cro. Jac. 399. 522. 1. Sid. 423. Ray. 183. 1. Saund. 322. 1. Mod. 18. 113. 2. Lev. 274. 9. Mod. 72. 113. 171. 10. Mod. 1. 103. 234. Prec. Ch. 150. 308. Caſes Temp. Talb. 15. 19. 216. 252. Abr. Eq. 255. 379. 1. Peer. Wms. 91. 109. 321. 780. 2. Peer. Wms. 134. 314. 397. 415. 645. 668. 3. Peer. Wms. 215. 222. 251. 347. 381. 1. Vern. 60. 84. 149. 226. 276. 296. 366. 484. 2. Vern. 50. 106. 303. 428. 552. 670. 736. 754. Gilb. Eq. Rep. 6. 10. 34. 108. 166. Stra. 243. 1. Bac. Abr. 530.

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iſſue

HOLLIS against CARR.

issue on his lady, *Lucy*, one child since dead; the lady is likewise dead; the jointure was not made, nor the portion paid. Afterward, in the year 1664, an act of parliament was made for settling old *Sir Robert Carr*'s estate, whereby the trustees therein named are appointed to sell it for payment of debts, and raising this portion; by which act all conveyances made by old *Sir Robert Carr* since the year 1639 are made void, except such as were made upon valuable considerations; but all those made by him before the said year with power of revocation (if not actually revoked) are saved; and in the year 1636 he had executed a conveyance, by which he had made a settlement of his estate in tail with a power of revocation; but it did not appear that he did ever revoke the same. The greatest part of the lands appointed by this act of parliament to be sold by the trustees, are the lands comprised in that settlement; and now, after the death of *Sir Robert Carr*, the plaintiff exhibits his bill against the son (not knowing that such a settlement was made in the year 1636, till the defendant had set it forth in his answer); and by this bill he desires that the trustees may execute their trust, &c. and that he may have relief.

ON *the defendant's side* it was urged, That after the marriage there was a bond given for an additional jointure, and it was upon that account that the defendant was drawn in to execute these articles: and if the very reason and foundation of his entering into them failed, then they shall not bind him in equity; and in this case it did fail, because the plaintiff had disabled himself to make any other jointure, by a pre-conveyance made and executed by him of his whole estate; and if this agreement will not bind him, then this Court cannot enlarge the plaintiff's remedy, or appoint more than what by the articles is agreed to be done: neither can the defendant's sealing encumber the estate tail in equity, because
[88] the lands were * not then in him, his father being tenant in tail, and then living; and the subsequent descent by which the lands are cast upon him, alters not the case, for the very right which descends is saved by the act from being charged.

BUT *on the other side* it was argued, That though the marriage did proceed upon the defendant's sealing, yet the assurance which was to be made, was a principal motive thereunto; and it being agreed before marriage, though not executed, it was very just that he should seal afterwards; and though the additional jointure was not made, yet there was no colour that the defendant should break his articles for that reason; because if the bond be not performed, it is forfeited, and may be sued; and nothing appeared in the case, of any conveyance made by *Sir Francis* whereby he had disabled himself to make an additional jointure, and he hath expresly denied it upon his oath. And though it was objected, that the money was raised by the old *Lady Carr*, and by the direction of the trustees lodged in the hands of one *Cook*, who is become insolvent; it was answered, that there was no proof of the consent of the trustees, and therefore this payment cannot alter the case.

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THE LORD CHANCELLOR, after the matter thus stated, delivered his opinion—That the six thousand pounds unpaid and unsatisfied is due to the plaintiff; for though the marriage had not taken effect, yet the *covenant* binds the defendant, because a deed is good for a duty, without any consideration.—SECONDLY, The plaintiff has remedy against the person of the defendant at law for this six thousand pounds.—THIRDLY. He has remedy against such of the defendant's lands which are not comprised in the settlement made in the year 1636; for as to them the trustees may be enjoined to execute the trust. HOLLIS *against* CARR.

And he desired the opinions of the two Justices, if any thing more could be done in this case.

WYNDHAM, *Justice*, was of opinion, that nothing more could be done, but to make a decree to enforce the execution of the trust.

And WYLDE, *Justice*, said, that the plaintiff has his remedy at law against the defendant, and upon the act of parliament against the trustees; but upon these articles no decree could be made to bind the lands, for that would be to give a much better security than the parties had agreed on. But if there had * been a covenant in the articles, that a fine should be levied, it might have been otherwise; it is only that a fine is intended to be levied. [89]

But as to that THE LORD CHANCELLOR was of opinion, that it was a good covenant to levy a fine, for the words "articles of "agreement, &c." go quite through, and make that clause a covenant.

But because WYLDE, *Justice*, was of another opinion, he desired THE ATTORNEY-GENERAL to argue these three points:

FIRST, Whether this was a covenant to levy a fine or not?

SECONDLY, If it was a covenant, Whether this Court can decree him to do it; for though the party has a good remedy at law, yet whether this Court might not give remedy upon the land?

THIRDLY, If it was a covenant to levy a fine, and the Court may decree the defendant to do it, yet whether such a decree can be made upon the prayer of this bill, it not being particularly prayed? for the plaintiff concluded his bill with praying relief in the execution of the trust, &c.

In *Trinity Term* following, these points were argued by MAYNARD, *Serjeant*, SIR JOHN CHURCHILL, and SIR JOHN KING, *for the plaintiff*; Mr. ATTORNEY and Mr. SOLICITOR, and Mr. KECK, *for the defendant*, all in one day, and in the same order as named.

The counsel for the defendant urged, That this was no covenant in law to enforce the defendant to levy a fine. It is agreed that there is no need of the word "covenant" to make a covenant, but any See Doe v. Clare, 2. Term Rep. 739.

HOLLIS against CARRE.

any thing under the hand and seal of the parties which imports "an agreement," will amount to "a covenant:" so in 1. *Roll. Abr.* 518. these words in a lease for years, *viz.* "that the lessee "shall repair," make a covenant: so in the case of indentures of apprenticeship there are not the formal words of a covenant, but only an agreement that the master shall do this, and the apprentice shall do that, and these are covenants; but in all these cases there is something of an undertaking: as in 1. *Roll.* 519. *Walker v. Walker*, if a deed be made to another in these words, *viz.* "I have a "writing in my custody, in which *W.* standeth bound to *B.* in "one hundred pounds, and I will be ready to produce it;" this is a covenant, for there is a present engaging to do it, but there are no such words here; it is only a recital, "that whereas a fine is "intended to be levied to such uses," &c.; it is only introductive to another clause, without positive or affirmative words, and there-

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fore can never be intended to make a covenant, but are * recited to another purpose, *viz.* "to declare the use of a fine, in case such "should be levied." If articles of agreement are executed in consideration of an intended marriage, and one side covenant to do one thing, and the other side another thing, was it ever imagined that upon these words, "whereas a marriage is intended," &c. that an action of covenant might be brought to enforce the marriage? and yet there is as much reason for the one as the other: therefore since the parties have neither made nor intended it for a covenant, it is not necessary that it should be so construed. If this is a covenant, the parties at common law could only bring an action of covenant, and recover damages for not levying of the fine, and that the plaintiff may do now upon the express covenant for non-payment of the money; but then the breach must be assigned according to the words, *viz.* "that the defendant did "not levy a fine as intended;" who may plead that a fine was never intended to be levied: and by what jury shall this be tried? It may be objected, that every article stands upon its own bottom, and the title of them being "ARTICLES OF AGREEMENT" extends to every paragraph. But as to that, each of these articles is to be considered by itself; and every paragraph begins, *viz.* "IT IS COVENANTED," &c. which shews it was never intended to make it a covenant by the title of the articles; and the rather, because it is unreasonable to make such a construction; for it is not to be supposed that a man will covenant that a fine shall be levied, as in this case, by *A.* and *B.* and himself, when it is not in his power to compel another.

9. Mod. 162.
10. Mod. 45.
412. 467.
12. Mod. 32.
Comyns, 29.
Cases Temp. Talb. 234. 239.
1. Vern. 60. 84
132. 149. 216.
3. Pter. Wms. 372.
Ld. Ray. 289. 729. 1051.

SECONDLY, Admitting it to be a covenant, yet it would be very hard to decree the execution of a fine *in specie*, for the father of the defendant was alive when he executed the deed; and the father being tenant in tail, who never sealed, the son could have no present right, who did seal; and if matters had stood now as then, How could a court of equity decree a fine by which a right might be extinguished, but could never be transferred, and by which no use could be declared? for though such a fine be good by *estoppel* before the tail descends to the issue, yet no use can be declared thereupon, nor upon any fine by

by *estoppel*; and there is no reason why length of time should put the plaintiff into a better condition than he was when the articles were executed.—THIRDLY, * and lastly, Since here is a particular relief prayed in nowise concerning the levying of this fine, but only a relief in the execution of the trust, this Court cannot decree the defendant to levy one, it being against the constant course and rules thereof.

HOLLIS *against* CARR.

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But on the other side it was said by the plaintiff's counsel, that the words do declare the intent of the parties that a fine shall be levied; and it is the intent which makes the agreement; and where there is an agreement, an action of covenant will lie. If a man covenant to do such a thing in consideration of a marriage, and then there is this clause, *viz.* "Whereas it is intended that he shall "marry before *Michaelmas*, that then, &c." certainly upon the whole deed here is a good covenant to marry before *Michaelmas*. In this case it is covenanted, that six thousand pounds shall be paid, and that it shall be secured as herein is after mentioned; then it is declared, that a fine is intended to be levied for that purpose; this is a good covenant to make a security by a fine. But if the particular manner how the security was to be made had been omitted, yet upon the words "covenant to secure it" the Court hath a good ground to make a decree to levy a fine, that being the only way to secure it.—SECONDLY, As to the objection, that the defendant had but a possibility of having the estate when he entered into this covenant; admitting it to be so, yet why should that be a reason to hinder him from making good the security when he hath it? If father and son covenant to make an assurance, and the father who had the estate in possession die, the decree must then operate upon that estate in the hands of the son.—THIRDLY, Here is a general prayer for a proper relief, in which the plaintiff's case is included: and therefore prayed judgment for him.

The court of chancery may decree the performance of a covenant to levy a fine, although the bill do not pray relief upon that ground.

Mitford's Pleadings, 108.

THE LORD CHANCELLOR, presently after the arguments on each side, delivered his opinion, that upon the whole frame of the articles there was a covenant to levy a fine; for wherever there is an agreement under hand and seal, covenant lies (*a*); that in this case there was a plain covenant, if the first article of giving farther security be coupled to that paragraph of intending to levy a fine, for that is the farther security intended; so that the meaning of the parties runs thus: "I do intend to levy a fine, which is "for the securing of six thousand pounds;" and this appears to be their agreement. Now there are many cases where words * will make a covenant, because of the agreement, when the general words of "covenant, grant, &c." are wanting; as "yielding and paying" will make a covenant (*b*), for the reasons aforesaid. And therefore the party having provided himself of

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(*a*) 1. Lev. 47. Cases in Chan. 294.

(*b*) See the cases of Hays *v.* Bickerstaff, ante, 34. and Cook *v.* Herle, post. 138.

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Hollis *against* Carr.

real as well as personal security by these articles, he said he would not deprive him of it, especially when it might be more trouble to bring an action of covenant for the not levying of the fine; for upon that many questions might arise, as who should do the first act, &c.

For these reasons he decreed the execution of the fine *in specie*.

TRINITY TERM,

The Twenty-Eighth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*
Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.*
Sir William Scroggs, *Knt.* } *Justices.*
Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Case 68.

* Ingram *against* Tothill.

A justification in avowry for taking a distress by virtue of a lease for so many years, if *A. B.* and *C.* so long live, must aver, that one of them is alive; and if it state that one of them died, it must also aver that he died seised.

REPLEVIN.—The case was, One *Trevil* made a lease for ninety-nine years, if *A. B.* and *C.* should so long live, rendering an heriot after the death of each of them successively, as they are all three named in the deed.—The last named died first.

The question was, If an heriot should be paid?

STROUD, *Serjeant*, urged, that it should not, because the reservation is the lessor's creature, and therefore to be taken strongly against him: as if rent be reserved to him and his assigns *(a)*, or to him and his executors, the heir shall not have it: so is the authority in 33. *Eliz. Owen* 9. REDDENDUM to the lessor, his executors, and administrators, *durante termino* 21 *annorum*, &c.; the heir shall not have the rent, because it is not reserved to him *(b)*.

S. C. post. 281. S. C. 1. Mod. 216. S. C. 3. Keb. 785. 829. S. C. 1. Vent. 314. S. C. 2. Lev. 210. Plowd. 431. Cro. Eliz. 18. Moor, 306. 335. Cro. Jac. 622. 8. Mod. 72. 123. 221. 9. Mod. 32. 122. 157. 171. 11. Mod. 45. 12. Mod. 23. Prec. Ch. 156. Abr. Eq. 46. 1. Vern. 165. 283. Cases Temp. Talb. 44. 268. 1. Peer. Wms. 516. 3. Peer. Wms. 20. 61. 145. 252. 5. Com. Dig. "Pleader" (C. 66.). 3. Bac. Abr. 53.

(*a*) By NORTH, *Chief Justice*, a devisee is not an assignee to take.—(*b*) Wotton *v.* Edwin, Latch. 274. But in Surry *v.* Brown, Latch. 99. on a reservation *reddend. annuatim durante termino prædict.* to the lessor and his assigns, the heir shall have it, though not named. Sacheverel *v.* Froggart, 2. Saund. 367.—*Notes to the* FORMER EDITION.

INGRAM *against* TOTHILL.

In this case the heriot is reserved if the three die successively, and the lessor is contented to trust to that contingency.

As to this point THE COURT gave no opinion. But judgment was given for the plaintiff upon the pleading. FIRST, Because the defendant had justified the taking of a distress, by virtue of a lease for a term of years, if three live so long, and did not aver that any of the lives were in being (*a*).—SECONDLY, He sets forth that one of them was seised, and being so seised died, but doth not say *obiit inde seisit.*—And these were held incurable faults.

(*a*) But see 21. *Jac.* 1. c. 23. and 4. & 5. *Ann.* c. 16.

*[94]

Case 69.

* Barrow *against* Haggett.

In a FORMEDON *in discender*, where the demandant is brother to the tenant in tail, it is sufficiently shewn that the tenant in tail died without issue, to say the land *belonged* to him after the death of the tenant in tail.—S. C. 1. Mod. 219. S. C. 3. Lev. 55. Co. Lit. 326. Fitz. N. B. 116. 10. Mod. 140. 362. 367 Ld. Ray. 431.

FORMEDON IN DISCENDER.—The tenants by TURNER, *Serjeant*, of counsel with them, took three exceptions to the count.

FIRST, The demandant, being brother to the tenant in tail who died without issue, sets forth, that the land belonged to him *post mortem* of the tenant in tail, without saying that he died without issue: in the ancient Register in a *formedon* it is pleaded that the tenant in tail died without issue; and so it is in *Co. Ent.* 254. b. *Rast. Ent.* 341. b. *quæ post mortem* of the donee *reverti debeant*, *eò quòd* the donee *obiit sine hærede:* all the precedents are so, 9. *Edw.* 4. *pl.* 36.

In a FORMEDON *in discender*, the demandant counts, that his eldest brother was heir, and that after his death he became heir; and held not repugnant. 5. Com. Dig. "Pleader" (3. E. 2.).

SECONDLY, The demandant makes as if there were two heirs of one man, which cannot be pleaded; for he counts, that his eldest brother was heir to his father, and that after his death he is now heir, which cannot be, for none is heir to the father but the eldest son, and therefore when they are both dead without issue, the next brother is heir to him who was last seised, and not to the father; and then he ought to be named, which is not done in this case, *Hern's Pleader*, *fol.* It is true, in a FORMEDON *in reverter* (the tail being spent) the donor ought not to name in his count every issue inheritable to the tail, because he may not know the pedigree; and therefore it is well enough for him to say, "*quæ post* "*mortem* of the donee *ad ipsum reverti debeant*, *eò quòd* he died "without issue;" but in a FORMEDON *in discender* it is presumed that the demandant knows the discent, and therefore he ought to name every one to whom any right did discend: *Jenkins v. Dawson*, *Hetley*, 78.

In a FORMEDON *in discender*, the demandant must make himself heir to the tenant in tail. Reg. 239. a. 8. Co. 88. Dyer, 216. F. N. B. 212.

THIRDLY, The demandant hath not set forth that he is heir of *I.* begotten on the body of his wife, which he should have done; because this being in the *discender*, he must make himself issue to the tail.

SEYS, *Serjeant*, answered these exceptions. And as to the first he said, That in a FORMEDON *in discender* he need not set forth that the tenant in tail died without issue, which he agreed must be done

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in a FORMEDON *in remainder* or *reverter*, 39. *Edw.* 3. *pl.* 27. *Old Ent. tit.* "*Formedon*" *pl.* 3. 7. *Hen.* 7. *pl.* 7. b. a caſe expreſs in the point. BARROW *againſt* HAGGETT.

* TO THE SECOND EXCEPTION he ſaid, That it was no repugnancy in pleading to ſay that two were heirs to one man, for they may be ſo at ſeveral times; and ſo it appears to be in this caſe, ſince it is ſaid *poſt mortem* of his brother, who was heir. * [95]

TO THE THIRD EXCEPTION, It is well ſet forth, that the demandant was the iſſue of *Ingram* begotten of the body of *Jane*; for he ſaith his brother was ſo; and after his death he was brother and heir of him, which is impoſſible to be unleſs he was begotten as aforeſaid.

And of this opinion were ALL THE COURT, *viz.* that it is well enough ſet forth, that the tenant in tail died without iſſue; for if he had any children alive, it could not diſcend to the demandant as brother and heir, which he hath alledged: and they all agreed the difference between a FORMEDON in the *diſcender*, *remainder*, and *reverter*. Cro. Car. 435.

And as to THE SECOND EXCEPTION, there is no contradiction to ſay two are heirs to one, *tempore diviſo*.

And THE LAST EXCEPTION had no force in it.

But then it was obſerved, that the demandant in his writ had ſet out his title after the death of the tenant in tail, and in the count it is only *quæ poſt mortem*, &c. But to that it was anſwered, it relates to the writ, and what is therein ſhall ſupply the "*et cætera*" in the count. An *et cætera* in a *declaration* may be ſupplied by the *writ*.

TRINITY TERM,

The Twenty-Eighth of Charles the Second,

IN

The King's Bench.

Sir Richard Rainsford, *Knt. Chief Justice.*
Sir Thomas Twisden, *Knt.*
Sir William Wylde, *Knt.* } *Justices.*
Sir Thomas Jones, *Knt.*
Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Woodward *against* Aston. Case 70.

INDEBITATUS ASSUMPSIT for ten pounds in money received to the plaintiff's use; and upon a trial at bar *(a)* this Term, the case upon evidence was thus:

If the office of *clerk of the papers* be granted to two persons for their lives, and the life of the longest liver of them, it is an entire office, and *neither* of them can make *a deputy* or appoint a successor.

Sir Robert Henley, prothonotary of the court of king's bench, makes a grant of the office of clerk of the papers (which of right did belong to him) unto *Mr. Vidian* and *Mr. Woodward* for their lives, and the life of the longest liver of them. Afterwards *Mr. Vidian* makes a parol surrender of this grant, and then *Sir Robert Henley* makes a new grant to *Mr. Woodward* and *Mr. Aston* the defendant for their lives, and for the life of the survivor: *Mr. Vidian* dies:

The question was, Whether the plaintiff *Woodward* should have all the profits of the office by survivorship?

S. C. 1. Vent. 296.
S. C. 1. Freem. 429.
12. Mod. 10.
Cases Temp. Talb. 97. 127. 143. 3. Bac. Abr. 738.

IT WAS AGREED that this was one entire office; and as one of them cannot make a deputy, so he cannot appoint a successor.

(a) The *trial at bar* is said to have been *permitted* because the parties were officers of the court. S. C. 1. Ventris, 296.

If two persons be appointed jointly to the office of clerk of the papers, a new grant made on the *surrender* of one, by the *consent* of the other, is good.

But the doubt was, whether the plaintiff had not consented that the defendant should be taken into the office, and had agreed to the new grant which was made afterwards; for it was * admitted that if he consented before *Mr. Aston* came in, it must then be found for the defendant; for by this consent he had barred himself of his right and benefit of survivorship; and by his consenting to the new grant, which in law was a surrender of the first grant, the defendant is joint-tenant with the plaintiff; and if so, his action is not maintainable. And upon these two points only it was left to the jury, who found for the defendant.

The question, Whether a consent to surrender an office was *compulsory* or *voluntary*? is a *fact* for the jury to try.

The evidence to the first point was, that when *Mr. Vidian* proposed to the Court, that the defendant might succeed him, after some opposition and unwillingness in the plaintiff to agree to it, yet at length he declared that he did submit to it, and accordingly the defendant was admitted; but there was no formal entry of his admittance as an officer, but only the Court's declaring their consent that he should take his place.

On the other side it was insisted on for the plaintiff, and proved, that his submission to the Court was with a *salvo jure*, and what he did was *reluctante animo*, thinking it was a hardship upon him, as he often since declared; so that it was *quasi* a compulsory consent made in obedience to the Court, with whom it was not good-manners in him to contend.

Quære, If the *cancelling* of the deed by which an office is granted is an extinguishment of the office? Plowd. 381.

SEVERAL POINTS were stirred at the trial; as,—FIRST, Whether a surrender of the grant of an office by parol was good?—SECONDLY, Whether if a grant be made of an office, or of any other thing which lies in grant, and the deed is lost or cancelled, the office or the thing granted falls to the ground? for the deed is the foundation; and a case was cited in the *Lord Dyer*; If there be two joint-tenants, and one cancels the deed, it hath destroyed the right of the other. *Quære* of these things (*a*).

If two have an office for their lives and the survivor, a surrender by one destroys the survivorship. Cro. Eliz. 197. 258. Cro. Jac. 399.

But IT WAS AGREED, that if two men who have one office for their lives and the survivor of them, if one surrender to the other, and then a new grant is made to this other and a stranger, he hath debarred himself of the survivorship, and he and the stranger are jointly seised.

(*a*) It is said, S. C. Freem. 429. that IT WAS AGREED, that although this is an office that cannot pass but by deed, the loss or cancelling of the deed does not destroy the right of the grantee in the officer, if the deed can be proved.

Crossman

* Croſſman *againſt* Sir John Churchil. Caſe 71.

QUARE IMPEDIT.—The plaintiff's title was ſet forth in his declaration; and it was alſo found in a ſpecial verdict, that *Sir George Rodney* was ſeiſed of the advowſon in fee, and died ſeiſed, leaving two ſiſters who were his coheirs; that they and *Sir John Rodney*, being alſo one of the ſame family, and pretending a right to the eſtate, for preventing ſuits that might happen, all enter into an agreement by indentures mutually executed, by which it was agreed, that *Sir John Rodney* ſhall hold ſome lands in ſeveralty, and the co-heirs ſhall hold other lands in the like manner; and as for this advowſon a temporary proviſion was made thereof, that each of them ſhould preſent by turns, and this was to continue till partition could be made; then comes an act of parliament and confirms the indenture, and enacts, "That every "agreement therein contained ſhall ſtand, and that all the reſt of "the lands, not particularly named and otherwiſe diſpoſed by the "ſaid indenture, ſhould be held by theſe three in common;" one of the three, who by agreement was next to preſent, grants the next avoidance (the church being then full) to the plaintiff.

If three perſons, each claiming a ſole right to an *advowſon*, enter into an agreement by indenture to preſent *by turns*, they have no remedy againſt each other but upon the *covenants*; but if an act of parliament is made confirming this indenture, and ordaining that they ſhall be *tenants in common*, an intereſt is *veſted* in each till partition made.

The queſtion was, Whether theſe three perſons were not tenants in common of the advowſon? and if ſo, then the grant of the next avoidance cannot be good by one alone, becauſe he hath not the whole advowſon, but only a right to the third part.

6 Co. 12. 2. Roll. Rep. 255. 2. Inſt. 365. F N. B. 62. 12. Mod. 321.

It was ſaid, that if tenants in common had made ſuch an agreement, it would not have been any diviſion of their intereſt; for there muſt be a partition to ſever the inheritance.

The Court were all of opinion, that judgment ſhould be given for the plaintiff; for there was an agreement that there ſhall be a preſentation by turns, and therefore for one turn each hath a right to the whole advowſon by reaſon of the act of parliament by which that agreement is confirmed, and thereby an intereſt is ſettled in each of them till partition made; but this agreement would have veſted no intereſt in either of them without an act of parliament to corroborate it; therefore there had been no remedy upon it but by an action of covenant.

Note, This caſe was argued four times, and not one authority cited.

* The Earl of Shaftſbury *againſt* Lord Digby. Caſe 72.

SCANDALUM MAGNATUM.—The plaintiff declares upon the ſtatute of 2. *Rich.* 2 c. 5. for theſe words, "You are not "for the king, but for ſedition and for a common-wealth, and by "God we will have your head the next ſeſſions of parliament."

A declaration in an action of *ſcandal. magnatum* need not recite the ſtatute 2. *Rich.* 2. ſt. 1. c. 5. for it is a general law; and is good, although it uſe the words "*contraſtat mendacia*" for "*deviſe lies*," and omit the words "*and other*" in reciting the ſtatute, and do not alledge that the defendant *ſpoke the words*.—S. C. 3. Keb. 631. 641. 667. S. C. 2. Jones, 49. S. C. 1. Freem. 422. Poll. 166. 4. Co. 12. Cro. Car. 136. Vid. Ent. 74. Palm, 565. Ley, 82. Jones, 194. Com. 439. 11. Mod. 64. 84. Bull. N. P. 4.

After

THE EARL OF SHAFTSBURY against LORD DIGBY. After verdict for the plaintiff, and a thousand pounds damages given, it was moved in arrest of judgment, and several exceptions taken.

FIRST, As to the recital of the statute, the words of which are, "that no man shall devise any lies, &c." and the plaintiff for the word "devise" had used the *Latin* word "*contrafacio*" in his declaration, which was very improper, that being "to "counterfeit" and not "to devise;" for it should have been *machino* or *fingo*; those are words more expressive of *devise*.

SECONDLY, It is alledged that the defendant *dixit mendacia* of the plaintiff, VIZ. "*hæc Anglicana verba sequen.*" and doth not alledge that he spoke the words.

THIRDLY, The most material objection was a mistake in the recital of the statute, the words of which are, "that none shall "speak any scandalous words of any dukes, earls, &c. the justices "of either bench, *nor of any other* great officer of the kingdom;" but the plaintiff in his declaration recites it thus, "None shall "speak any scandalous words of any dukes, earls, &c. justices "of either bench, great officers of the kingdom," and leaves out the words "*neque al.*" so that it must be construed thus, "None "to speak of any dukes, earls, &c. being great officers of the "kingdom;" and then it is not enough that the plaintiff is *comes*, but he also ought to be a great officer of the kingdom, which is not set out in this case.

But upon great debate and deliberation these exceptions were over-ruled; and THE WHOLE COURT gave judgment for the plaintiff.

As to THE FIRST EXCEPTION they said, "*contrafacio*" is a legal word, and apt enough in this sense; and so are all the precedents, and thus it was pleaded in the *Lord Cromwel's Case*.

11. Mod. 64. 84. As to THE SECOND EXCEPTION it was said, the *mendacia* which were told, were the *English* words which were spoken; and the "VIZ. *hæc Anglicana verba sequen.*" being in the accusative case,
[99] are governed by the same verb which governs the words *precedent, VIZ. "*horribilia mendacia.*" Besides, for the supporting of an action the VIZ. may be transposed, and then it will be well enough, VIZ. "the defendant spoke *hæc Anglicana verba*, VIZ. "lies of the plaintiff."

As to THE THIRD EXCEPTION it was answered, that the plaintiff need not recite the statute, it being a *(a)* general law. And admitting there was no necessity, yet if he will undertake to recite it, and mistake in a material point, it is incurable. But if he recites so much as will serve to maintain his own action truly, and mistakes the rest, this will not vitiate his declaration; and so he hath

(*a*) Sid. 348. Post. 301. Fitzg. 45. 65. Ld. Ray. 120. 343. 4. Bac. Abr. 658.

done

done here by reciting so much of the statute which enacts, "that "no man shall speak any scandalous words of *an earl*," which is enough (he being *an earl*) to entitle him to an action; and he concludes, "*prout per eundem actum plenius liquet.*"

THE EARL OF SHAFTSBURY against LORD DIGBY.

THE COURT grounded themselves principally upon a judgment given in this court, which was thus: There was a robbery committed, and the party brought an action upon the statute of HUE AND CRY, 13. *Edw.* 1. c. 1. in which he recited "*incendia domorum*," the said statute beginning, "Forasmuch as from day to day "robberies, murders, *burning of houses, &c.*" and the precedents are all so: but the parliament-roll is "*incendia*" generally without "*domorum*;" and it was strongly urged that it was a mis recital, which was fatal: but the Court were all of opinion, that the plaintiff's case being only concerning a robbery, for which the statute was well recited, and not about burning, which was mistaken, it was for that reason good enough; and judgment was given accordingly.

WHEN this cause was tried at the bar, which was in *Easter Term* last, the *Lord Mohun* offered to give his testimony for the plaintiff, but refused to be *sworn*, offering to speak upon his *honour*.

A peer, in giving his testimony in causes between party and party, must be sworn.

But WYLDE, *Justice*, told him, in causes between party and party he must be upon his oath.

The *Lord Mohun* asked him, whether he would answer it.

THE JUDGE replied, that he delivered it as his opinion. And because he knew not whether it might cause him to be questioned in another place, he desired the rest of the Judges to deliver their opinions, which they all did, and said he ought to be sworn. And so he was, but with a *salvo jure*; for he said there was an order in the house of peers, "that it is against the privilege of the "house for any lord to be sworn."

TRINITY

TRINITY TERM,

The Twenty-Eighth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*

Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.* } *Justices.*
Sir William Scroggs, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Anonymous. Case 73.

In what manner a declaration in *debt* on the 1. *Eliz.* c. 2. and 23. *Eliz.* c. 1. may conclude.

DEBT, UPON THE STATUTE FOR NOT COMING TO CHURCH; and concludes, *per quod actio accrevit eidem domino regi et quer. ad exigend. et habend.* The EXCEPTION, after judgment, was taken, That it ought to have been only *actio accrevit eidem* the plaintiff, *qui tam, &c.* and not *exigend. et habend.* for the king and himself—*Sed non allocatur:* for upon search of precedents THE COURT were all of opinion that it was good either way.

Anonymous. Case 74.

In an action of account against *a factor*, he shall not be allowed a sale upon *credit*, although the goods were *bona peritura*; for, without a special commission, a factor cannot sell the goods of his principal, except for *ready money.*—1. Roll. Abr. 125. Co. Lit. 89. Abr. Eq. 369. 2. Vern. 638. 10. Mod. 144. 12. Mod. 514. 602. Stra. 1178. 1182. 3. Peer. Wms. 185. 187. 279. Cowp. 255.

ACCOUNT.—Judgment was given *quod computet.* The defendant pleads before the auditors, that the goods whereof he was to give a reasonable account were *bona peritura*; and though he was careful in the keeping of them, yet they were much the worse; that they remained in his hands for want of buyers, and were in danger of being worse, and therefore he sold them upon credit to a man beyond sea. The plaintiff demurred.

ANONYMOUS.

And THE WHOLE COURT, after argument by BARREL, *Serjeant, for the plaintiff*, and BALDWIN, *Serjeant, for the defendant*, were of opinion that the plea was not good. For if a merchant deliver goods to his factor *ad merchandizand.* he cannot sell them upon credit, but for ready money, unless he hath a particular commission from his master so to do; for if he can find no buyers, he is not answerable; and if they are *bona peritura*, and cannot be sold for money upon the delivery, the merchant must give him authority to sell upon trust. If they are burned, or he is robbed without his own default, he is not liable. And in this case it was not pleaded that he could not sell the goods for ready money; and the sale itself was made beyond sea, where the buyer is not to be found: like the case of *Sadock v. Burton* (*a*), where in account against a factor he pleads that he sold the jewel to the *King of Barbary* for the plaintiff's use; and upon a demurrer the plea was held naught; for when a factor hath a bare authority to sell, in such case he hath no power to give a day of payment, but must receive the
* [101] money immediately upon the sale. * Therefore in the case at bar, if the master is not bound by the contract of the servant without his consent, or at least the goods coming to his use; neither shall the servant have authority to sell without ready money, unless he hath a particular order for that purpose.

Quære, If a plea to account before auditors need be verified by oath?

THERE was another thing moved in this case for the plaintiff: That the plea ought to be put in upon oath; for having pleaded that he could not sell without loss, he ought to swear it: *Fitzh. Accompt*, 47.—But no opinion was delivered herein; only THE CHIEF JUSTICE said, that the plaintiff ought to have required the plea upon oath, for otherwise it was not necessary.

But for the substance of the plea it was held ill, and judgment was given for the plaintiff.

(*a*) 1. Bulst. 103. Yelv. 202.

Case 75.

Harris's Case.

If a husband die, leaving his wife his executrix, and she dies before probate, administration of the husband's effects must be to the next of kin of the husband, and not the next of kin of the wife.

1. Roll. Ab[r.]

HOPKINS, *Serjeant*, moved for a prohibition. The case was: A man makes a will and appoints his wife to be executrix, and devises a shilling to his daughter for a legacy, and dies. The executrix, before probate of the will, dies also intestate.

The question was, Whether the goods shall be distributed, by the 22. & 23. *Car.* 2. c. 10. for settling intestates estates, amongst the *next of kin*, to the *executrix* or to the *next of kin* to the *testator* her husband; since she dying before probate, her husband, in judgment of law, died also intestate?

This case seems to be out of the statute, the husband having made a will, and the act intermeddles only where no will is made.

[illegible] Jones, 225. 5. Co. 9. Cro. Eliz. 211. Abr. Eq. 249. 1. Vern. 200. 403. 473. Fitzg. [illegible]. 303. 10. Mod. 315. 12. Mod. 16. 306. 615. Cases Temp. Talb. 209. 1. Salk. 309. [illegible] Mod. 59. 65. Show. 2. 25. 1. Com. Dig. 262.

THE

THE COURT delivered no judgment in it, but seemed to incline that the statute did extend to this very case, and that administration must be committed to the next of kin of the husband; but if there should be no distribution, it must then be according to the will of the testator. Harris's Case.

Reder *against* Bradley. Case 76.

Judgment reversed in an inferior court, where the damage was laid to 30l.

IT was moved to reverse a judgment given in AN HONOUR COURT upon a writ of false judgment brought here.

The plaintiff declared in the action below, that there was a communication between him and the defendant concerning the service of his son; and it was agreed between them, that in consideration * the plaintiff would permit his son to serve him, the defendant promised to pay the plaintiff thirty shillings. The plaintiff avers, that he did permit his son to serve him, and that the defendant hath not paid him the thirty shillings. There was a verdict for the plaintiff.

* [102]

Post. 206. 4. Term Rep. 495.

The exceptions now taken were —FIRST, It is not said that the jurors were *electi ad triand. &c.*—SECONDLY, He lays his damage to thirty pounds, of which a court-baron cannot hold plea; for the difference taken by my *Lord Coke* is, where *damages* are laid under forty shillings, *costs* may make it amount to more; but where it is laid above, in such case all is *coram non judice*; for which reason judgment was reversed. But in this court the Judge doth not pronounce the reversal, as it is done in the king's bench.

Lane *against* Robinson. Case 77.

Trespass *vi et armis* and *contra pacem* may be brought in the *hundred court*.

TRESPASS FOR TAKING OF HIS CATTLE. The defendant justifies by virtue of an execution in an action of trespass brought in a hundred court; and the plaintiff demurred.

PEMBERTON, *Serjeant*, took two exceptions to the plea.

FIRST, Because the inferior court not being of record cannot hold plea of a trespass *quare vi et armis et contra pacem.*—But it was not allowed; for trespasses are frequently brought there, and the plaintiff may declare either *vi et armis* or *contra pacem.*

Cro. Jac. 442. 526. Hob. 180. Sid. 348.

Justification under a judgment in an inferior court by *taliter processum* is good.

SECONDLY, The defendant, reciting the proceedings below, saith, "*taliter processum fuit*," whereas he ought particularly to set forth all that was done, because not being in a court of record the proceedings may be denied, and tried by jury.—But THE COURT inclined, that it was pleaded well enough, and that it was the safest way to prevent mistakes.

Post. 195.

3. Lev. 403. Ld. Ray. 80. 1. Wils. 316. 2. Wils. 5. and see the case of Rowland *v.* Veale, Cowp. 18.

But

Quære, If to a justification in trespass, under process of an inferior court, the plaintiff may reply, *de injuriâ suâ propriâ?* &c.

But if the plaintiff had replied, *de injuriâ suâ propriâ absque tali causâ*, that had traversed all the proceedings.—*Quære*, Whether such a replication had been good? because the plaintiff must answer particularly that authority which the defendant pretended to have from the Court.—But no judgment was given.

* [103]

Case 78.

* Sherrard *against* Smith.

In trespass for taking goods, if the defendant justifies by command of the lord of the manor of whom the plaintiff held by fealty and rent, and that for non-payment of the rent he took the goods by way of distress, the plaintiff may reply, that the place WHERE is *extra*, ABSQUE HOC that it is *infra feodum*, without taking the tenancy upon him.

13. Assise, 28. 28. Assise, 41. 9. Co. 20. 34. And. 237. Dyer, 311. 2. Inst. 296. Co. Lit. 1. 4. Bac. Abr. 106. 389. 392, 393.

TRESPASS *quare clausum fregit*, and for taking away his goods. The defendant justifies the taking by the command of the lord of the manor, of which the plaintiff held by fealty and rent, and for non-payment thereof the goods were taken *nomine districtionis*. The plaintiff replies, that the *locus in quo est extra*, ABSQUE HOC *quòd est infra feodum*. The defendant demurs specially, because the plaintiff pleading *hors de son fee*, should have taken the tenancy upon him, as in *Bucknal's Case (a)*, where this is given as a rule by LORD COKE.

PEMBERTON, *Serjeant*, on the other side agreed, that in all cases of assise *hors de son fee* is no plea, without taking the tenancy upon him. And in the Year Book 5. *Edw.* 4. *pl.* 2. it is said, that in *replevin* the party cannot plead this plea, because he may disclaim; but *Brook* in his Abridgement of this case (*b*) saith, this is not law, and so is the Year Book 2. *Hen.* 6. *pl.* 1.; and many cases afterwards were against that Book of *Edw.* 4. and that a man might plead *hors de son fee:* as if there be a lord and tenant holding by fealty and rent, and he make a lease for years, and the lord distrain the cattle of the lessee, though the tenant hath paid the rent and done fealty; there if the lessee alledge that his lessor was seised of the tenancy in his demesne as of fee, and held it of the lord by services, &c. of which services the lord was seised by the hands of his lessor, as by his true tenant, who hath leased the lands to the plaintiff, and the lord, to charge him, hath unjustly avowed upon him who hath nothing in the tenancy, it is well enough, as in the *case of avowries (c)*; and the reason given in the Year Book of 5. *Edw.* 4. about Disclaimer will not hold now, for that course is quite altered, and is taken away by the statute of the 21. *Hen.* 8. c. 19. which enacts, "that avowries shall be made by the lord upon the land, without naming his tenant." But in case of *trespass* there was never any such thing objected as here; for what tenancy can the plaintiff take upon him in this case? He cannot say *tenen. liberi tenementi*, for this is a bare action of trespass, in which though the pleading is not so formal, yet it will do no hurt; for if it had been only * *extra feodum*, without the traverse, it had been good enough.

* [104]

(*a*) 9. Co. 33. to 36. See also 22. *Hen.* 6. 2. Keilw. 73. 2. Ass. pl. 1. 4. Ass. pl. 13. and Co. Lit. 1. b.

(*b*) Bro. Abr. tit. "Hors de son Fee," pl. 15.

(*c*) 9. Co.

And of that opinion was THE COURT in Hilary Term following, when judgment was given for the plaintiff (*absente* SCROGGS). And THE CHIEF JUSTICE said, that the rule laid down by LORD COKE, in *Co. Lit.* 1. b. that there is no pleading *hors de son fee* without taking the tenancy upon him, is to be intended in cases of assise; and so are all the cases he there cites for proof of that opinion, and therefore so he is to be understood: but this is an action of *trespass* brought upon *the possession*, and not upon *the title*. In the case of *avowry*, a stranger may plead generally *hors de son fee*, and so may tenant for years; and this being in the case of a *trespass* is much stronger, and if the plaintiff destroy the defendant's justification, it is well enough.

SHEERARD against SMITH.

See 11. *Geo.* 2. c. 19.

Sir William Hickman *against* Thorne and Others.

Case 79.

REPLEVIN. The defendant justifies the taking, for that the *locus in quo* was his freehold, and that he took the cattle there *damage fesant*.—The plaintiff in bar to the avowry replies, that the *locus in quo*, &c. is parcel of such a common-field, and prescribes to have right of common there, as appendant to two acres which he hath in another place.—The defendant rejoins, that there is a custom, that every freeholder who hath lands lying together in the said common-field may inclose against him who hath right of common there, and that he had lands there, and did inclose.—The plaintiff demurs.

On pleading a custom to inclose lands *lying together*, it is not necessary to aver that *the lands inclosed* did lie together.

S. C. 1. Freem. 210. Co. Lit. 114. Yelv. 2. 217. 9. Co. 58. Hob 107. Cro. Car. 431. Comyns, 341. 1. Vern. 32. 308. 456. 2. Vern. 103. Com. Dig 470.

NEWDIGATE, *Serjeant*, took exceptions to the rejoinder.—FIRST, For that he did not aver, that the lands which he inclosed did lie together, and therefore had not brought his case within the custom alledged.—*Sed non allocatur*, because he could not inclose if the lands had not laid together.

116. 301. 356 575. Ld. Ray. 237 889. 1. Salk. 203.

SECONDLY, He gives no answer to the plaintiff's right of common but by argument, which he should have confessed with a *bene et verum est*, and then should have avoided it by alledging the custom of inclosure; like the case of *Russel v. Broker* (a), where in trespass for cutting oaks the defendant pleads, that he was seised of a messuage in fee, and prescribes to have *rationabile estoverium ad libitum capiend. in boscis*; the plaintiff replies, that the *locus in quo* was within the forest, and that * the defendant and all those, &c. *habere consueverunt rationabile estoverium*, &c. *per liberationem forestarii*; and upon a demurrer the replication was held naught, because the plaintiff ought to have pleaded the law of the forest, viz. *lex forestæ talis est*, or to have traversed the defendant's prescription, and not to have set forth another prescription in his replication without a traverse.

If a defendant justify the taking in replevin as in his freehold, and the plaintiff prescribes for right of common; * [105] *Quære*; If the defendant can plead *a custom to* inclose without confessing the right of common. 5 Com. Dig. "Pleader" (C. 3.)

(a) 2. Leon. 209.

A prescription against another prescription is not good without a traverse.

THIRDLY, The defendant should have pleaded the custom, and then have traversed the prescription of the right of common; for he cannot plead a custom against a custom; as in *Aldred's Case (a)*, where one prescribes to have a light, the other cannot prescribe to stop it up.

Moor, 572.
Cro Eliz 693.
1. Leon, 44
77.
Yelv 141.
Hob. 80.
1. Wilf. 253.

PEMBERTON, *Serjeant*, *contra*. He said, that which he took to be the only question in the case was admitted, *viz.* That such a custom as this to inclose was good, and so it has been adjudged in *Sir Miles Corbet's Case (b)*. But as to the objections which have been made, the defendant admits the prescription for right of common, but saith he may inclose against the commoners, by reason of a custom which is a bar to his very right of common, and therefore need not confess it with a *hoc est verum est*, neither could he traverse the prescription, because he hath admitted it. It is true, where one prescribes to have lights in his house, and another prescribes to stop them up, this is not good, because one prescription is directly contrary to the other, and for that reason one must be traversed, but here the defendant hath confessed, that the plaintiff hath a right of common, but it is not an absolute but a qualified right, against which the defendant may inclose and here being two prescriptions pleaded, and one of them not being confessed, it must from thence necessarily follow, that the other is the issue to be tried, which in this case is, Whether the defendant can inclose or not?

THE CHIEF JUSTICE and THE WHOLE COURT were of opinion, that where there are several freeholders who have right of common in a common field, such a custom as this of inclosing is good, because the remedy is reciprocal, for as one may inclose, so may another.

But ATKYNS, *Justice*, doubted much of the case at bar, because the defendant had pleaded this custom to inclose in bar to a freeholder who had no land in the common field where he claimed right of common, but prescribed to have such right there as appendant to two acres of land he had *alibi*, for which reason he prayed to amend upon payment of costs.

(a) 9. Co. 58. (b) 7 Co. 5.

TRINITY TERM,

The Twenty-Eighth of Charles the Second,

IN

The Exchequer.

Sir William Montague, *Knt. Chief Baron.*

Sir Edward Turner, *Knt.*
Sir Edward Thurland, *Knt.*
Sir Vere Bertie, *Knt.*
} *Barons.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

* Attorney General *against* Sir Edward Turner. Case 80.

Agrant from the king of certain lands, and also "*totum illud fundum et solum et terras suas contiguè adjacentes quæ sunt aquâ cooperta vel quæ in posterum de aquâ possunt recuperari*", will not pass land afterwards gained from the sea.

INFORMATION.—The case was, That the king by letters patents granted several lands in *Lincolnshire* by express words; and then this clause is added, upon which the question arose, "*Nec non totum illud fundum et solum et terras suas contiguè adjacen.* to the premises, *quæ sunt aquâ cooperta vel quæ in posterum de aquâ possunt recuperari.*" And afterwards a great quantity of land was gained from the sea.

The question was, Whether the king or the patentee was entitled to those lands?

SAWYER, *for the king*, argued, that he had a good title, because the grant was void, he having only a bare *possibility* in the thing granted at that time.

But LEVINS *on the other side* insisted, that the grant of those lands was good, because the king may grant what he hath not in *possession*, but only a *possibility* to have it. But admitting that he could not make such a grant, yet in this case there is such a certainty as the thing itself is capable to have, and in which the king hath an interest; and it is hard to say that he hath an interest in a thing,

S. C. Ray. 241. S. C. 2. Lev. 171. Post. 185. Dyer, 326. Cro. Jac. 509. 1. Bulst. 194. Moor, 571. 1. Sid. 149. 2. Roll. Abr. 170. 2. Roll. Rep. 168. 2. Co. 32. 8. Mod. 8. 12. 19. 105. 12. Mod. 77. Fitzg. 90. 290. 308. 2. Peer. Wms. 182. (608.) Ld. Ray. 49. 51. 182. 4. Bac. Abr. 154.

ATTORNEY GENERAL *against* SIR EDWARD TURNER.

thing, and yet cannot by any means dispose of it. If it should be objected, that nothing is to pass but what is *contiguè adjacen.* to the premises granted, and therefore an inch or some such small matter must pass, and no more; certainly that was not the intention of the king, whose grants are to be construed favourably, and very bountifully for his honour, and not to be taken by inches. If there are two marshes adjoining which are the king's, and he grants one of them by a particular name and description, and then he grants the other *contiguè adjacen. ex parte australi*, certainly the whole marsh will pass; and it is very usual in pleading to say a man is seised of a house or close, and of another house, &c. *contiguè adjacen.* that is to be intended of the whole house. In this case the king intended to pass something when he granted *totum fundum*, *&c.* but if such construction should be made as insisted on, then those words would be of no signification. It is true, the word "*illud*" is a relative, and restrains the general words, and
* [107] implies that which may be shewn as it were * with a finger; and therefore in *Doddington's Case* (*a*), a grant of *omnia illa messuagia* situate in *Wells*, and the houses were not in *Wells* but elsewhere, the grant in that case was held void, because it was restrained to a certain village, and the pronoun "*illa*" hath reference to the town; but in this case there could be no such certainty, because the land at the time of the grant made was under water. But if the patent is not good by the very words of the grant, the *non obstante* makes it good, which in this case is so particular, that it seems to be designed on purpose to answer those objections of any mistake or incertainty in the value, quantity, or quality of the thing granted; which also supplies the defects for want of right instruction given to the king, in all cases where he may lawfully make a grant at the common law, 4. *Co.* 34. *Bozun's Case.* And there is another very general clause in the patent, *viz.* "*Damus* "*præmissa adeo plenè*," as they are or could be in the king's hands by his prerogative or otherwise. *Adeo plenè* are operative words (*b*), *Whistler's Case*, 10. *Co.* 63. And there is also this clause, "*omnes terras nostras infra fluxum et refluxum maris.*" It is true, these words "*præmissis præd. spectan.*" do follow; from whence it may be objected, that they neither did or could belong to the premises; and admitting it to be so, yet the law will reject those words rather than avoid the grant in that part. In the case of the *Abbot of Strada Marcella* (*c*) the king granted a manor, *et bona et catalla felonum dicto manerio spectan.*: now though such things could not be appendant to a manor, yet it was there adjudged that they did pass. Such things as these the king hath by his prerogative, and some things the subject may have by custom or prescription, as wrecks, &c. And in this very case it is said, that there is a custom in *Lincolnshire* that the lords of manors shall have derelict lands, and it is a reasonable custom; for if the sea wash

(*a*) 2. Co. 32. 242. 12. Co. 75. 1. Saund. 275.
(*b*) Ante, 4. Bac. Abr. 213.
(*c*) 9. Co. 27. b. But see Raym.

away

away the lands of the subject, he can have no recompence unless he should be entitled to what he gains from the sea: and for this there are some authorities; as *Sir Henry Constable's Case*, 5. *Co.* land between high-water and low-water mark may belong to a manor.

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But no judgment was given *(a)*.

(*a*) The report of this case in Sir T. Ray. 242. says, it was adjourned; but LEVINZ, *Serjeant*, who was counsel for the patentee, reports, that afterwards MONTAGUE, *Chief Baron*, and THE COURT, with the advice of RAINSFORD, *Chief Justice* of the king's bench, and NORTH, *Chief Justice* of the common pleas, held, that nothing passed by these general words of the grant: "*Omne* "*solum, fundum, terram, arenam, terram mariscal. contiguè adjacens præmissis, quæ modo inundat. vel aqua maris cooperta existunt, et quæ ad aliquod tempus imposterum recuperat forent per relictionem maris, vel aliter alio quocunque modo, non obstante non nomi-*"*nando valorem quantitatem vel quali-*"*tatem*;" but that the patent, as to the quantity of land which became derelict after the patent, was void. S. C. 2. Lev. 171.

EASTER TERM,

The Twenty-Eighth of Charles the Second,

IN

The King's Bench.

Sir Richard Rainsford, *Knt. Chief Justice.*
Sir Thomas Twisden, *Knt.*
Sir William Wylde, *Knt.* } *Justices.*
Sir Thomas Jones, *Knt.*
Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

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* Morris *against* Philpot.

Case 81.

A release by an executor before probate is not good.

THE PLAINTIFF, as executor to *T.* brings an action of debt against the defendant, as admininistrator to *S.* for a debt due from the said intestate to the plaintiff's testator. The defendant pleads, that the plaintiff released to him "all "brewing vessels, &c. and all other the estate of *S.* lately de- "ceased" (this release was before probate of the will); to which plea the plaintiff demurred.

S. C. 3. Keb. 814. 840. S. C. 2. Show. pl. 32. S. C. 2. Lev. 214. S. C. T. Jones, 104. Abr. Eq. 241. 1. Vern 32. 2. Vern. 114. 136. 522. 563. 10. Mod. 165. 171. 254. 325. 423. 12. Mod 10. 153. 201. 411. 496. 527. 573. 611.

And, Whether this release was a good bar to the plaintiff's action? was the question.

It was said, *for the plaintiff*, that it was not; for if a conusee release to the cognisor all his right and title to the lands of the cognisor, and afterwards sue out execution, yet he may extend the very lands so released: so if the debtee release to the debtor all his right and title which he hath to his lands, and afterwards gets a judgment against him, he may extend a moiety of the same lands by *elegit*; the reason is, because at the time of these releases given, they had no title to the land, but only an inception of a right, which might happen to take place *in futuro:* so here a release by

Prec. Ch. 49. 173. 540. Cases Temp. Talb. 217 226. 240. 2. Peer. Wms. 332. 3. Peer. Wms. 132. 316. 321. 330. 381. Stra. 70. 440. 1028. 1271. Ld. Ray. 1306. 2. Bac. Abr. 413.

Morris *against* Philpot.

the executor of the debtee to the administrator of the debtor before probate of the will, is not good; because by being made executor, he had only a possibility to be entitled to the testator's estate, and no interest till probate, for he might refuse to prove the will, or renounce the executorship. It is true, a release of all actions had been good by the executor before probate (*a*), because a right of action is in him, and a debt which consists merely in action is thereby discharged; but in such case a release of all right and title would not be good, for the reasons aforesaid.

But, *for the defendant*, it was insisted, that this release was a good plea in bar; for if a release be made by an executor of all his right and title to the testator's estate, and then the executor sues the party released (as the administrator is sued in this case) for a debt due to the testator, the release is good; because if he had recovered, in this case the judgment must be *de bonis testatoris*, which is the subject matter; and that being released, no action can lie against the administrator.—*Adjournatur* (*b*).

(*a*) Godolphin, 145. pl. 4.

(*b*) This appears to be the same case with that reported 2. Lev. 214. under the name of *Morris v. Wilford*, in which it is said, that Jones, Wylde, and Twisden, *Justices*, upon the first argument, were of opinion, that the release was no bar, notwithstanding the general words; for being made for particular purposes, the general words are to be guided by the particular purposes.—Rainsford, *Chief Justice*, *contra*.—After the cause had been argued several times at the bar, in Hilary Term the 30. & 31. *Car.* 2 judgment was given for the plaintiff by the whole Court; and with this report the S. C. 3. Keb. 814. and T. Jones, 104 agree; but S. C. 2. Show. 32. says it was adjourned.

MICHAELMAS

MICHAELMAS TERM,

The Twenty-Eighth of Charles the Second,

I N

The King's Bench.

Sir Richard Rainsford, *Knt.* *Chief Justice.*

Sir Thomas Twisden, *Knt.*
Sir William Wylde, *Knt.*
Sir Thomas Jones, *Knt.* } *Justices.*

Sir William Jones, *Knt.* *Attorney General.*

Sir Francis Winnington, *Knt.* *Solicitor General.*

* Piggot on the Demise of Sir Thomas Lee *against* The Earl of Salisbury. Case 82.

Easter Term, 26. *Car.* 2. *Roll* 609.

EJECTMENT FOR FOURTEEN HOUSES AND SOME GARDENS in the parish of *St. Martin in the Fields*.

A wife, being tenant for life, with remainder in tail to *A.* remainder to her husband for life, and other remainders over, joins with husband in a fine *sur concessit*, by which they grant the estate to themselves for life with warranty; the warranty descends to the remainder-man in tail.

The jury find as to all but one moiety for the defendant: as for the other moiety, they find, that these were formerly the houses of one *Nightingale*, who was seised thereof in fee, and made a lease of them, which commenced 1 *April*, 7. *Jac.* 1. yet in being: That the reversion descended to *Bridget*, his daughter and heir, who married *William Mitton*, by whom she had a daughter named *Elizabeth*: That upon the marriage of the said *Elizabeth* with *Francis* the son of *Sir Oliver Lee*, by fine and other settlements, these houses were settled to the use of the said *Bridget* for life, then to the use of *Francis Lee* and the said *Elizabeth*, and the heirs on the body of the said *Elizabeth* to be begotten by *Francis*; and for want of such issue, to *William Mitton* for life; and afterwards to the right heirs of *Bridget Mitton* for ever. *William*

Quære, If the estate which the husband and wife had in possession only passed? or, Whether that and the estate for life which the husband had in remainder after the estate-tail likewise passed? —S. C. 2. Lev. 154. S. C. 2. Jones, 68. S. C. Pollexf. 146. S. C. 3. Keb. 321. 580. 632. 681. 695. Cro. Jac. 200. Abr. Eq. 255. 1. Vern. 149. 226. 2. Vern. 3. 56. 10. Mod. 3. 4. 142. 11. Mod. 103. 196. 210. 12. Mod. 512. Gilb. Eq. Rep. 17. 108. 1. Barnes, 147. Cases Temp. Talb. 234. 164. Stra. 414. Salk. 338. Ld. Ray. 34. 179. 782. 850. 872. Cruise on Fines, 285. 3. Peer. Wms. 146. 3. Atk. 729.

Mitton

Pigott against the Earl of Salisbury.

Mitton and *Bridget* his wife, before the expiration of the term, levy a fine *sur concesserunt* to two cognisees, wherein the said husband and wife *conced. tenementa præd. et totum et quicquid habent in tenementis præd. cum pertin.* for the life of the said husband and wife, and the survivor of them with proclamations. They find, that the lessee for years attorned, and that the fine thus levied was
* [110] in trust for the *Earl of Salisbury*; and that * before the first day of *February*, before the action brought, he entered by the direction of the two cognisees, and that he was seised *prout lex postulat*: That 1 *February*, 7. *Jac.* 1. *Sir Oliver Lee*, and *Francis Lee* his son and heir, and *Elizabeth* his wife, *William Mitton*, and *Bridget* his wife, by bargain and sale conveyed the premises to *the Earl* and his heirs, which was enrolled in chancery, in which deed there was a warranty against *Sir Oliver* and his heirs: That in the same Term, viz. *Octab. Purificationis, William Mitton* and *Bridget* his wife levied a fine *sur cognisance de droit come ceo*, &c. to the earl: That *Francis Lee* was son and heir of *Sir Oliver Lee*: That *Sir Oliver* and *Elizabeth* died in the life-time of *Francis*, and that *Francis* died leaving issue *Sir Thomas Lee*, the now lessor of the plaintiff: That the warranty descended upon him, being inheritable to the estate tail: That the estate of the *Earl of Salisbury* descended to the present earl, who was the defendant; and that *Sir Thomas Lee* entered, and made a lease to the lessor of the plaintiff.

The question upon this special verdict was, Whether by the fine *sur concesserunt* levied 7. *Jac.* 1. the estate which the husband and wife had in possession only passed, or whether that and the estate for life, which the husband had after the tail spent, passed likewise? If the latter, then they passed more than they could lawfully grant, because of the intervention of the estate tail; and then this fine wrought a displacing or divesting the estate of *William Mitton* for life in reversion, and turned it into a right (*a*); and if so, then this collateral warranty of *Sir Oliver Lee* will descend on *Sir Francis*, and from him to the plaintiff, and will bar his entry (*b*): but if the estate was not displaced and turned into a right at the time of the warranty, then the heir is not barred by this collateral warranty of his ancestor.

This case was argued by Pemberton, *Serjeant, for the plaintiff*, and by Sir William Jones, *Attorney General, for the defendant.*

Pemberton, *Serjeant, for the plaintiff*, said, that this fine passed only the estate which *William Mitton* and his wife had in possession and no other, and therefore worked no divesting; and
[111] his reasons were:—* First, Such a construction seems most agreeable to the intention of all the parties to the fine.—Secondly, It may well stand with the nature and the words of the fine — Thirdly, It will be most agreeable both to the judgments and

(*a*) Co. Lit. 338. b. (*b*) See 4. &. 5. *Ann.* c. 16.

opinions

opinions which have formerly been given in the like cafes.—And as to THE FIRST of thefe, it will be neceffary to confider what will be the effect and confequence of levying this fine both on one fide and the other. It cannot be denied, but that there was *a purchafe* intended to be made under this fine, and that the parties were willing to pafs away their eftate with the leaft hazard that might be to themfelves; neither can it be imagined that they intended to defeat this purchafe as foon as it was made, which they muft do if this fine works a forfeiture; for then he in remainder in tail is entitled to a prefent entry, and fo the eftates for life, which the hufband and wife had, are loft, and there was a poffibility alfo of lofing the reverfion in fee, which the tenant in tail after his entry might have barred by a common recovery. And had not the parties intended only to pafs both the eftates, which they lawfully might pafs, why did they levy this fine *fur conceffit?* They might have levied a fine *fur cognifance de droit come ceo, &c.* and that had been *a diffeifin.* Befides, what need was there for them to mention any eftate which they had in thefe houfes, if they had intended a diffeifin? But this being done, fuch a conftruction is to be made as may fupport the intent of the parties; and it would be very unreafonable, that what was intended to preferve the eftate fhould now be adjudged to work a diffeifin fo as to forfeit it, and fuch a diffeifin upon which this *collateral warranty* fhall operate and bar the eftate in remainder. And therefore no more fhall pafs by this fine than what lawfully may; and rather than it fhall be conftrued to work a wrong, the eftate fhall pafs by fractions; for both the eftates of *William Mitton* for life are not fo neceffarily joined and united by this fine that no room can be left for fuch a conftruction. —SECONDLY, Such a conftruction will not agree with the nature and words of this fine. It is true, a fine, as it is of the moft folemn and of the greateft authority, fo it is of the greateft force and efficacy to convey an eftate, and the moft effectual feoffment of record, where it is a feoffment; and likewife the moft effectual releafe, where it is to be a releafe. * But on a bare agreement made in actions between the demandant and tenant at the bar, and drawn up there, the Judges will alter and amend fuch fines, if they did not in all things anfwer the intention of the parties. It is agreed, that fines can work a diffeifin when they can have no other interpretation; as if tenant *pur auter vie* levy a fine to a ftranger for his own life, it is more than fuch a tenant could do, becaufe his eftate was during the life of another, and no longer. So a fine *fur cognifance de droit, &c.* implies a fee, which being levied by any one who has but a particular eftate will make a diffeifin. But this fine *fur conceffit* has been always taken to be the moft harmlefs of all others, and can be compared to nothing elfe than a grant of *totum ftatum fuum et quicquid habet, &c.* by which no more is granted than what the cognifor had at the time of the grant; and fo it hath been always conftrued. Indeed there is a fine *fur conceffit* which expreffes no eftate of the grantor, and this is properly levied by tenant in fee or tail; but when particular tenants pafs

* [112]

24. *Edw.* 3. 36. Poftea.

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10. Mod. 175. 185. 245. 2. Vern. 684. 2. Peer. Wms. 400. 456.

over their several estates, they generally grant *totum et quicquid habent in tenementis prædictis*, being very cautious to express what estate they had herein. When this fine *sur concessit* was first invented, the Judges in those days looked upon the words "*quicquid habent, &c.*" to be insignificant; and for that reason in *the Year Book* 17. *Edw.* 3. *pl.* 66. they were refused. The case was, Two husbands and their wives levied such a fine to the cognisee, and thereby granted "*totum et quicquid habent, &c.*" which words were rejected, and the Judge would not pass the fine, because if the party had nothing in the land, then nothing passed; and so is 44. *Edw.* 3. *pl.* 36.; by which it appears that the Judges in those times thought these fines did pass no more than what the cognisor had: and for this there are multitude of authorities in THE YEAR BOOKS. Now these words cannot have a signification to *enlarge* the estate granted, they serve only to *explain* what was intended to pass; for in the case at the bar, if the grant had been "*totum et* "*quicquid habent in tenementis prædictis*," there would have been no question of the estate granted; but the cognisors having granted "*tenementa prædicta*," they seem, by these subsequent words, to recollect themselves, VIZ. *totum et quicquid habent in tenementis* * [113] *prædictis*. * But it may be objected, that the limitation of the estate, VIZ. "*durante vitâ eorum et alterius eorum diutius viventis*," works a disseisin; because, by those words, two estates for life pass entire in possession, whereas in truth there was but one estate for life of the husband in possession; and therefore this was more than they could grant, because the estate tail came between the estate which the husband and wife had for their lives and for the survivor of them, and the estate which the husband had for his own life. And this is farther enforced by that rule in law, that "*Estates shall not pass* "*by fractions*;" for otherwise there can be no reason why they should not thus pass. But this rule is very fallible, and not so much to be regarded. It is true, the rule is so far admitted to be true, where, without inconveniency, estates may pass without fraction; but where there is an inconveniency it may be dispensed withal, it being such an inconveniency as may appear to the Judges to make the thing granted to go contrary to the intent of the parties. And that such interpretations have been made, agrees with the third reason proposed in this case, *viz.* That it hath received countenance by judicial opinions and determinations in former judgments, 14. *Edw.* 4. *pl.* 4. 27. *Hen.* 8. *pl.* 13. 1. *Co.* 67. *Bredon's Case*, which was thus: Tenant for life; remainder in tail to *A.*; remainder in tail to *B.*; tenant for life and he in the first remainder levied a fine *sur cognisance de droit come ceo*; it was adjudged that this was no *discontinuance* of either of the remainders, because each of them gave what he might lawfully, VIZ. the tenant for life granted his estate, and the remainder-man passed a fee-simple determinable upon this estate tail, and yet each of their estates were still divided.

1. Roll. Abr. lit. 1. pl. 4. 1 Inst. 45. a. Cro. Car. 406.

On the other side it was said, that in all cases where the person who hath a particular estate takes upon him, either by feoffment

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in pais or by *fine*, which is a feoffment on record, to grant a greater estate than he hath (as in this case is done), though possibly the estate of the grantee may determine before that of the grantor, yet it is a displacing the reversion: as if a man has an estate for ten lives, and makes a grant for the life of another; here is a possibility that the estate which he granted may be longer than the estate he had in the thing granted, because one man may survive the ten, and for that reason it is a divesting.—FIRST, In this case the estate which the husband and wife had is to be considered: SECONDLY, What they granted. * And by the comparing of these together it will appear whether they granted more than they had. The husband and wife had an estate for the life of the wife, and (after the estate tail) the husband had an estate for his own life; now they grant an estate for the life of the husband and wife and the survivor: What is this but one entire estate in possession? No other interpretation can be agreeable to the sense of the words; for if it had been granted according to the true estate which each had, then it should have been, first for the life of the wife, and after the tail spent, then for the life of the husband.—The next thing to be considered is, Whether the estate shall pass entire or by fractions? And as to that, I need say no more than only to quote the authority of that judgment given in the case of *Garret v. Blizard*, 1. *Roll. Abr.* 855. which is shortly thus, viz. Tenant for life, remainder for life, remainder in tail, remainder in fee to the tenant for life in remainder; this tenant for life in remainder levies a fine *come ceo, &c.*: it was adjudged a forfeiture of his estate for life; so that the remainder-man in tail might enter after the death of the tenant for life in possession; for it shall not be intended that he passed his estate by fractions, viz. an estate in remainder for life, and a remainder in fee expectant upon the estate tail, but one entire estate in possession: and it is not like the authority in *Bredon's Case* (*a*), for there the estate for life and the estate tail followed one another. Next it is to be considered, whether, after they granted "*omnia illa tenementa*," the subsequent words, "*et totum statum suum, &c.*" do not come in by way of restriction, and qualify what went before. But those subsequent words are placed in this fine, not by way of restriction but of accumulation. In *Littleton*, *sect.* 613. it is said, that if tenant in tail grant all his estate in the tenements, *habendum* all his estate, &c. in this case the alienee hath but an estate for the life of the tenant in tail; and it is observable, that "*totum statum*," in the case put by *Littleton*, is both in the premises and the *habendum*: but if I will grant *tenementa prædicta* in the premises, and then make another limitation in the *habendum*, there "*totum statum et quicquid, &c.*" can make no restriction; if it should, it will spoil most conveyances. It is agreed, that if those words had been omitted in this case, then by this fine the reversion would be displaced; and therefore much weight is laid upon these words to explain the meaning of the parties thereby; and that when they

Margin notes: PIGGOT against THE EARL OF SALISBURY. — * [114] — Lit. 345.

(*a*) 1. Co. 67.

granted

PIGGOT *against* THE EARL OF SALISBURY.

Ante, 90. 10. Mod. 45. 12. Mod. 160. Stra. 512. 610. 818. 2. Peer. Wms. 127. 146. 3. Peer. Wms. 372. Ld. Ray. 289.

granted "*tenementa prædicta*" they meant "*totum statum, &c.*" * But here is no ground for such an interpretation; it is an entire grant of the houses by the words "*tenementa prædicta*," and the subsequent words shall never be allowed to make such a restriction which shall overthrow the frame of the deed. If a man who has no estate in the land passes it by deed, this shall work against him by way of *estoppel*, and these words "*totum et quicquid, &c.*" which are usual in all conveyances, shall make no alteration of the law; for if such construction should be made of these words as hath been objected, then in all deeds where they are inserted, if it happen that the party hath no estate or a void estate, nothing passes; and then covenants, estoppels, and warranties would be no securities in the law.—SECONDLY, These words "*totum et quicquid*," *&c.* come in a distinct clause of the grant; the precedent words are, "*tenementa prædicta et totum statum et quicquid, &c. reddiderunt*," which are two parts, a grant and a release, and have no dependance upon each other, being distinct clauses, and therefore these words shall not be any restriction of the former; but if one clause be carried on with a connection so as it is but an entire sentence, in such case a man may restrain either general or particular words, *Hob.* 171. in the case of *Stukely v. Butler.*—THIRDLY, Admitting these words are a restriction of the former, yet the estate is so limited, that if the first words were out of the case, this latter clause, he said, was enough for his purpose; for the grant is not in the usual words by which estates pass, *viz.* "estate, right, title, interest," but "*totum et quicquid, &c.*" for the lives of the grantors and the survivor; which shews that they took upon themselves to grant for a longer time than they had in possession; if they had only granted it for both their lives, they might have some colourable pretence.—FOURTHLY, It is apparent from the clause of the warranty, that the intent of the parties was to grant an estate expresly in possession for the lives both of the husband and his wife; for it is that which the grantee shall hold, &c. during their lives and the longer liver. The case of *Eustace v. Scaven (a)* has been objected. It is reported in *Cro. Jac.* 696. which is, Feme covert and *A.* are joint-tenants for life; the husband and wife levy a fine to *A.* the other joint-tenant, and grant the land and "*totum et quicquid habent, &c.*" to him during the life of the wife with warranty; the wife survives *A.* her companion: adjudged that these words "*totum et quicquid*" shall not enure by way of grant and severance of the jointure of the
*[116] moiety; for then there would be an * occupancy; but they are restrictive only to the estate of the wife, and shall enure by way of
Ld. Ray. 235. 664. release to *A.* so that after his death he in reversion may enter. But the answer is, It would not be a question in that case, Whether these words were restrictive or not? for nothing was granted but what might lawfully pass, viz. during the life of the wife the other joint-tenant: neither was there any stress laid on those words; for MR. JUSTICE JONES, who was a learned

(a) 2. Roll. Abr. 36. 403.

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man and reported the same case, *fol.* 55. hath made no mention thereof, but hath wholly omitted those words, which he would not have done if the case had depended upon them.—NEXT, The form of this fine has been objected; and a precedent was cited, *Rast. Ent.* 241. where such a fine was levied, and nothing passed but for the life of the conusor. But no authority can be produced where a man that had an estate for life in possession, and another in remainder, and granted by the same words, as in this case, but that it was a forfeiture.—It is ALSO OBJECTED, That the law will not make a construction to work a wrong; and therefore if tenant for life grant generally for life, it shall be interpreted during the life of the grantor. But that case is without express words, or shewing any time for which the grantee shall have the thing granted; and therefore the law restrains it to the life of the grantor, because it will not make words which are doubtful and of uncertain signification to do any wrong: but where there are express words, as in this case, no other construction can be made of them but that an estate in possession was thereby intended to pass.—ANOTHER OBJECTION is, That this fine and grant must be construed to enure according to the intent of the parties, *ut res magis valeat*, and they never intended to make a forfeiture. But certainly no man ever intended to make a forfeiture of his own estate, those are generally the effects of ignorance, and not of the will; as the case of *Gimlet v. Sands*, *Cro. Car.* 391. where tenant in fee makes a feoffment to two to the use of himself for life, then to the use of his wife for life, remainder in tail to his son and heir, remainder to his own right heirs; and afterwards he made another feoffment to *Smith* with warranty; the mother and son join in another feoffment: adjudged that this was a forfeiture of her estate for life, though she had no notice of the warranty made by her husband; for the feoffment made by him was a public act upon the land, and she ought to have taken notice of it; and though by her joining in the feoffment with her son she did not intend to forfeit her * estate, yet the law adjudges according to what is done. But in the case at bar the intention of the parties may be collected by the act done; and there is great reason to presume, that the parties thereby intended to displace the reversion; for the husband joining in the fine, and in the warranty (if it was no divesting), the warranty is of no use.—ANOTHER OBJECTION has been only mentioned, which is, That admitting this should amount to a displacing if the estate had been in possession, yet in this case it would not, because it was prevented by the lease for years in being. But that cannot hinder the execution of this fine; it is a fine *sur concessit*, which is executory in its nature, and doth not pass any estate or take any effect till executed; and so is the Year-Book 41. *Edw.* 3. *pl.* 14. b.—But in this case the fine was executed, which may be by matter *in pais* as well as by *scire facias*, and as to this purpose may be executed by the entry of the conusor without suing out any execution: 38. *Edw.* 3. *Brook. tit.* "*Scire Facias*," 199. If there had been a fine executed,

PIGGOT *against* THE EARL OF SALISBURY.

1. Roll. Abr. 856.

* [117]

1. Co. 106. Dyer, 376. b. Stra. 78. 106.

Pigeot against The Earl of Salisbury.

executed, there would have been little doubt left in this case; and by the attornment of the lessee for years, it must be admitted that this fine was executed; as 8. *Edw.* 3. *f.* 44. For a fine of a reversion may be executed to all purposes by the attornment of the lessee for years; and if so, when a fine executory is once executed, it is as good as a fine *sur conusance de droit come ceo* to make a forfeiture of the particular estate. Where a feoffment is made, and a lease for years is in being, the feoffment is not good, because in such case there must be a present transposition of the estate, which is hindered by the lease. But in case of a fine, which is a feoffment upon record, a lease for years is no impediment or displacing of the reversion; for if tenant in tail expectant upon a lease for years levy a fine, it is a discontinuance of the tail, and notwithstanding this lease the fine has such an operation upon the freehold that it displaces the reversion in fee: *Co. Lit.* 332. And therefore if a lease for years prevent not a discontinuance, much less will it hinder a displacing in this case.

Postea, Moor and Pitt, 287. Salk. 340. 1. Peer. Wms. 519.

But no judgment was given now in this case, another matter being debated, Whether the plaintiff could have judgment, because he was barred by the statute of Limitations? for it did not appear that he had been in possession for twenty years past, and [118] * the verdict hath not found any claim, or that the plaintiff was within the proviso of the act.

MICHAELMAS

MICHAELMAS TERM,

The Twenty-Eighth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*
Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.* } *Justices.*
Sir William Scroggs, *Knt.*
Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Waterfield *against* the Bishop of Chichester. Case 83.

A PROHIBITION was granted last *Easter Term* to the *Bishop of Chichester*, upon a suggestion made by *Waterfield*, that he being chosen churchwarden of the parish-church of *Arundel*, in the county of *Sussex*, the bishop tendered him an oath *ex officio*, which was, that he should present every parishioner who had done any offence, or neglected any duty mentioned in certain ARTICLES contained in a printed book delivered to him; some of which articles concern the church-warden himself; and so in effect he was to swear against himself, in one of any default, which is expressly against the statute of 13 *Car.* 2. c. 12. which prohibits any person having ecclesiastical jurisdiction to administer the oath *ex officio*, or any other oath, whereby the person to whom it is administered may be charged to accuse himself of any criminal matter, whereby he may be liable to any censure or punishment; and because the bishop had excommunicated him for refusing such oath, he prayed *a prohibition*; which was granted *quoad* the compelling him to make any answer to the said articles concerning himself, and the excommunication was discharged.

The spiritual court shall not be prohibited from citing a person chosen churchwarden to take the oath of office; but if they require an oath which tends to accuse the deponent, a prohibition lies. S. C. 1. Freem. 288. 1. Sid. 232. 2. Inst. 487. 537. 10. Mod. 338. Stra. 537. 539. Ld. Ray. 478. 991. 4. Com. Dig. 507.

A person elected churchwarden may be excommunicated for refusing to be sworn in. Hard. 364. 1. Mod. 194.

But now upon the motion of BRAMPSTON, *Serjeant*, *a consultation* was awarded, because it appeared by the affidavit of the commissary who tendered this oath, and likewise by the act of the Court, that he was excommunicated for refusing to take the oath of a church-warden according to law, which was the only oath tendered; and therefore the ground of the prohibition being false, *a consultation* was awarded.

The spiritual court may administer *an oath* and hold plea in other than *testamentary* and *matrimonial* causes. Plowd. 36.

In this prohibition it was recited, That the bishop cannot give an oath but in two cases, *viz.* in matters *testamentary* and *matrimonial*, whereas they have authority in many cases more. It is true also, that until his jurisdiction was increased by act of parliament, he could hold plea in none but those two causes; but by the statute *de circumspectè agatis* (*a*), and of *articuli cleri* (*b*), he may now hold plea in many other cases.

To print and circulate the proceedings of a court of justice with a defamatory intent, is a contempt of court.

THE BISHOP informed the LORD CHIEF JUSTICE, that the plaintiff *Waterfield* had caused two thousand of the prohibitions to be printed in *English*, and had dispersed them all over the kingdom, * intitling them, "A true translated copy of a writ of prohibition "granted by the Lord Chief Justice, and other the Justices of "the court of common pleas, in *Easter Term* 1676, against the "*Bishop of Chichester*, who had proceeded against and excommu-"nicated one *Thomas Waterfield*, a church-warden, for refusing "to take the oath usually tendered to persons in such office; by "which writ the illegality of all such oaths is declared, and the "said bishop commanded to take off his excommunication."

*[119]

S. C. Freem. 288. Hob. 215. Poph. 139. 252. Ld. Ray. 341. 417. 1. Hawk. P. C. ch. 73. s. 8. 12. 15. 2. Wils. 403. 2. Stra. 898. 2. Burr. 980. 4. Term Rep. 285.

And this was declared by THE COURT to be a most seditious *libel*, and gave order to enquire after the printer, that he might be prosecuted.

(*a*) 13. *Edw.* 1. stat. 4. (*b*) 9. *Edw.* 2. stat. 1.

MICHAELMAS

MICHAELMAS TERM,

The Twenty-Eighth of Charles the Second,

IN

The King's Bench.

Sir Richard Rainsford, *Knt. Chief Justice.*

Sir Thomas Twisden, *Knt.*
Sir William Wylde, *Knt.* } *Justices.*
Sir Thomas Jones, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Eleanor Plummer *against* Sir Jeremy Whitchot. Case 84.

Trinity Term, 27. *or* 28. *Car.* 2. *Roll* 3[illegible].

Debt for escape lies against the WARDEN of THE FLEET as superior; the grantee for life being insufficient.

S. C. 2. Lev. 158.
S. C. 2. Jones, 60.
S. C. 1. Vent. 314.
S. C. Lev. Ent. 56.
S. C. 3. Keb. 591. 701. 754. 758. 773.
1. Sid. 306.

DEBT FOR AN ESCAPE.—Upon *nil debet* pleaded, the jury found a special verdict, That *Sir Jeremy Whitchot* was seised in fee of the office of *Warden of the Fleet*, and of several messuages thereunto belonging; and being so seised, did make a grant thereof to one *Duckenfield* for life, and for the lives of three more (*a*). *Duckenfield*, by rule of Court, was admitted into the said office, being approved by the Court, and esteemed a man of an estate. He suffers a prisoner afterwards to escape, and being not able to make the plaintiff satisfaction, this action was brought against *Sir Jeremy Whitchot*, the now defendant.

And, Whether he was chargeable or not with this action? was the question.

WALLOP, *who argued for the plaintiff*, said, that he would not take up any of their time to make a narrative of imprisonment for

397. 2. Inst. 382. 2. Vern. 173. 10. Mod. 95. 11. Mod. 3, 4. 93. 12. Mod. 10. 199. Ld. Ray. 835. 1580.

(*a*) See 8. & 9. *Will.* 3. c. 27. s. 10. & 11.

Eleanor Plummer *against* Sir Jeremy Whitchot.

debt, or what remedy there was for escapes at common-law, and what remedy by the statute; but supposing an action of debt will lie, Whether it be by the statute of *Westminster* 2. *cap.* 11. (for at the common law before the making of that act, an action of debt would not lie against the gaoler for an escape, but a special action on the case, grounded on a trespass), or whether this action lay against the defendant by the statute of 1. *Rich.* 2. *cap.* 12. which gives it against the *Warden of the Fleet*, who in this case had not the actual freehold in possession but the inheritance, and not the immediate estate but the reversion? is in question. The office of the Warden of the Fleet may be taken in two capacities, either as [120] *an estate* or *common hereditament*, wherein * a man may have an inheritance, and which may be transferred from one to another; or as *a public office*, wherein the king and the people may have a special interest. As it is an inheritance transferrable, it is subject to the rules of law in point of descent, and is demisable for life, in fee, tail, possession, or reversion, and in many things is common, and runs parallel with other estates of inheritance. It is true, he cannot grant this office for years, not for any disability in the grantor, but in respect of the matter and nature of the thing granted, it being an office of trust and personal, for otherwise it would go to the executor, which is inconvenient. 9. *Co.* 96. *Sir George Reynell's Case.* To enquire what superiority the *reversioner* hath over the *particular estate* is not to the point in question; but there is such an intimacy and privity between them, that in judgment of law they are accounted as one estate. And therefore Littleton, *sect.* 452, 453. saith, that a release made to *a reversioner* shall aid and benefit him who hath the *particular estate*, and likewise a release made to the tenant of the freehold shall enure to him in reversion, because they are privies in estate; so that these two estates in the case at bar make but one office. This is a public office of great trust, and concerns the administration of justice; and therefore it is but reasonable to admit the rule of *respondeat superiori*, lest the party should be without remedy; and the rather, because execution is the life of the law, 39. *Hen.* 6. 33. He who is in the office as superior, whether it be by *droit* or *tort*, is accountable to the king and his people; and this brings him within the statute of *Westminster* 2. *cap.* 11. or 1. *Rich.* 2 *cap.* 12. If the defendant had granted the office in fee to *Duckenfield* before any escape had been, and the grantee had been admitted, the defendant then had been discharged; or if he die before or after the action brought, and before judgment, *moritur actio cum persona*; for if he had not reserved something he could not be charged, and if he had parted with the inheritance the privity had been gone, but by reserving that he hath made himself liable; for now he is superior, he may exact homage and fealty, and the particular tenant is said to be attendant upon the reversion, and these are marks of superiority. And this rule of *respondeat superior* holds, not only between the principal officer and his deputy, and between the master and his servant, but in many other cases one is to be answerable for another; as First, Where

See the case of Hambly v. Trott, Cowp. 371

*Where a man has power to elect an officer, he is chargeable. So the county hath power to elect coroners, and if they fail in their duty, the county shall be charged; for by reason of the power they had to elect, they are esteemed superiors, 2. *Inst.* 175.—SECONDLY, Where one man recommends another to an office concerning the king's revenue, the person who recommends is liable, if the other prove insufficient; and for this there is a notable case in the 30. *Edw.* 3. *pl.* 6.: it is *Porter's Case*, cited in the case of the *Earl of Devonshire*, 11. *Co.* 92. b. where *Porter*, being MASTER OF THE MINT, covenanted with the king to deliver him money within eight days for all the bullion delivered *ad cambium regis* to coin, which he did not perform; and because *Walwyn* and *Picard duxerunt et præsentaverunt* the said *Porter*, *ideo consideratum est quod onerentur versus dominum regem.* And why not the defendant in this case, who *præsentavit* the said *Duckenfield* to the Court *tanquam sufficientem*, the reason being the same? And the king is as much concerned in the ordering this court of justice as in the ordering of his coffers; for as the treasure is *nervus belli*, so the execution of the law is *nervus pacis.*—THIRDLY, In the case of a dependant officer, though he is a proper officer and no deputy, the person who hath the reversion shall answer; as in 32. *Hen.* 6. *pl.* 34. the *Duke of Norfolk*, who had the inheritance of THE MARSHALSEA, was charged for an escape suffered by one *Brandon*, who was tenant for life in possession of the said office: and there is great reason it should be so; for when a principal officer may make an inferior officer, who afterwards commits a forfeiture, the superior shall take advantage of this forfeiture; and it is as reasonable he should be answerable for his miscarriage. *Cro. Eliz.* 384. *the Earl of Pembroke v. Sir Henry Berkley.* And therefore admitting the defendant is out of the statute, yet he is within the maxim of *respondeat superior*, which is not grounded upon any act of parliament, as appears in the case of the coroner; and the statute of *Westminster the Second*, and all other acts which inculcate this rule, are but in affirmance of the common law: and this is not only a rule of the common, but also of the civil law, which is served with the equity of this maxim in cases of like nature; and since it is purely remedial, such a construction ought to be made as may most advance the remedy. 2. *Inst.* 466. In the case of *Morse v. Slue (a)* lately in this court, the question was, Whether a master of a ship should be charged upon *the common custom of *England*, for negligently keeping merchants goods? and adjudged that he was, though robbed. *Lex mercatoria* makes a provision for it; for the remedy against the master is most direct and immediate; that against the owner is collateral in favour of the merchant, to whom *datur electio*; and therefore that the interest of the merchant might be served, the law in that case provides a double remedy. And in *Linwood*, "*De*

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*[121]

4. Inst. 314.

4. Inst. 466. Fitzg. 186. Ld. Ray. 1580.

2. Inst. 382. 9. Rep. 98. Dyer, 278. b.

Poph. 116.

*[122]

(a) 1. Ventr. 191. 238. and 1. Mod. 85.

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"*Clerico non residente*, *verbo* "VICARIUS" (*a*), it is said, that in the same church there may be *a rector* and *a vicar*, and the cure of the church may be divided between them: the vicar is not the deputy of the rector, but hath a distinct office from him; and as the temporalities of the vicar are but a derivation from the benefice of the rector, so his cure is derived from that of the rector also. In like manner *Duckenfield* here is not a deputy to the defendant, but an immediate and proper officer, and the habitual care and custody is in him, which is enough to bring him within the rule of *respondeat superior*. These instances were given, because this is not only a maxim in *England*, but is of foreign production, and adapted to the rules of common law. The statute *de Scaccario*, 51. *Hen.* 3. *st.* 5. *f.* 8. enacts, "That if any man be received into "office in THE EXCHEQUER without the treasurer's licence, or if "he hath such licence and doth trespass, he shall be punished "according to his trespass if he have whereof, and if he have not "then he who put him in the office shall be charged, and if he be "not sufficient his superior shall be charged; so that they shall "all answer in their several stations." And this statute was made in affirmance of the common law. If therefore the superior of a superior should answer, why shall not the defendant in this case answer for his substitute? for though the warden is not sworn to appoint one who is sufficient to satisfy, he is bound to do it. And it is no argument to say that he is discharged, because *Duckenfield* was appointed by the Court; for that is a work of supererogation, which is left in the discretion of the Court, and may be done or omitted as they shall think necessary, but is not conclusive, 39. *Hen.* 6. *pl.* 34. especially since the jury have not found that the Court took any examination whether he was sufficient or not; but that he had forfeited his office, having wilfully suffered a prisoner to escape, and then the defendant is or may be the actual officer, and having taken security ought to be charged.

Bracton. Fleta. Selden.

[123] * SIR WILLIAM JONES, *who argued on the other side*, before he spoke to the case endeavoured to remove a doubt upon the special verdict, which found, that the defendant had taken security from *Duckenfield* to indemnify him from escapes. This, says he, might be an argument at *nisi prius* to induce a jury to find damages, but could not make a man chargeable who was not so before.—SECONDLY, Though the defendant had a covenant from *Duckenfield* to pay fifteen hundred pounds a-year to him, yet that will not make him more liable than if nothing had been to be paid. Neither did he lay any weight upon it, that the defendant had any notice of the insufficiency of *Duckenfield*, for if he is chargeable he is bound to take notice at his peril; and nobody can believe that the court of common pleas is chargeable, for that was mentioned in the argument for the plaintiff, that the superior of a superior shall be charged where he is insufficient.

(*a*) Book 3. fo. 73.

Neither

Neither did he insist upon the rule in the common pleas by which *Duckenfield* was admitted; but he considered, FIRST, Whether the defendant was chargeable by the statute of *Westminster the Second?* SECONDLY, If he could clear him from that statute, whether he was chargeable at the common law or by any other statute?—And he said, that he was not chargeable by the statute of *Westminster the Second*, which gives an action of debt against the gaoler for an escape. Many authorities might be cited to prove that where a man is in execution on an action of debt, that such an execution is not within that statute, 7. *Hen.* 6. *pl.* 5. *Bro. tit.* "*Escape*," *pl.* 9. *Pl. Com.* 35. It was doubtful there how a gaoler became chargeable for the escape of a man who was in execution for debt; but were he in execution for matter of account, he is chargeable by the express words of the statute, which are, "*caveat* "*sibi vicecomes et custos gaolæ*;" and the parliament in 1. *Rich.* 2. did not think the warden chargeable, for if they did, to what purpose was it to make the WARDEN OF THE FLEET liable to an action of debt for an escape of a man in execution for debt, if he was chargeable before by that statute of *Westminster the Second:* this was urged to shew that at that time it was not clear.

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But because there are authorities that seem another way, he did not affirm or deny it after such varieties of opinions, but proceeded to argue these two points: FIRST, That the rule of *respondeat superior* doth not extend to this case: SECONDLY, That a reversioner is not a superior.

* FIRST, The statute *de donis* is by some called the statute *of great men*, because the intent of it was for the preservation of their estates; and this statute being made in the same year *(a)*, seems also to have a particular regard to the lord, to give him a quick and more severe remedy against his servant and bailiff than he had before; for it makes him in effect his own judge against him in cases of account, because it gives him authority to assign auditors; and such as he appoints must stand, and the servant has no remedy but by writ *ex parte talis* in THE EXCHEQUER *(b)*; yet no man ever thought that by the equity of this statute the same may be done in an action of debt; and therefore the difference in the proceedings between actions of account and debt seems to imply, that an action of debt is not within the rule of *respondeat superior*.

* [124]

See the case of Glover *v.* Lane, 3. Term Rep. 445.

SECONDLY, There is a great difference between the restraint of prisoners in execution for debt, and those who are imprisoned by this act for arrear of rent, which directs that they shall be arrested, &c. *et carceri mancipentur in ferris*; but this the gaoler could not have done at the common law; neither was it ever practised or allowed by the law that a prisoner shall be so used who is in execution for debt, unless he be unruly and endeavour to escape; but it is expressly against the law to do it where there is no

(a) 13. *Edw.* 1. c. 46.

(b) F. N. B. 129.

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such reason, because a prison is for the safe custody of men and not to punish them, *Co. Lit.* 260. a. So that it appears by this that a stricter remedy was provided for executions in *account* than for those in *debt*.

THIRDLY, There are certain persons also who are made chargeable by this statute when the execution is in account, who cannot be charged in debt; for the statute enacts, "that if the "party escape, the officer in whose custody he is shall answer, "*sive infra libertatem sive extra*;" so that the gaoler shall be charged, whether he be of a franchise or of the county at large: but if a man be in execution for debt, and then escape, the gaoler is not liable, but the sheriff; though the gaoler hath the custody of the body of one whom the late sheriff did not deliver over to the present sheriff (*a*). So that in this also there is a difference upon this statute between actions of account and actions of debt; and therefore the clause therein of *respondeat superior* being made upon a particular occasion only in the case of account, shall not be extended to other matters, and can in no wise influence this case, which for other reasons cannot be governed by that rule, if extended to all who have power to depute an officer, and thereby give him an interest, or to appoint one for a time.

*[125] * SECOND POINT.—FIRST, Because he in reversion is not in propriety of speech *a superior*; for it is not said, that a reversioner, after an estate for life, is superior and of more account in the law than he who hath the particular estate, but on the contrary he who hath the freehold is of greater account and regard in the law than the reversioner after him; and if (as it hath been objected) both make but one estate, then there can be no superiority, and it would be very hard and difficult for any man to prove that any attendancy is made by the tenant for life upon him who hath the reversion.

SECONDLY, Here is room enough within the statute to satisfy that word "superior" by a plain and clear construction without bringing in the reversioner; for if the sheriff make a deputy, or a lord make a bailiff of a liberty, the sheriff and the lord are properly the superiors.

THIRDLY, This word "superior" is used in the statute made the same year with this (*b*) in signification agreeable with the case in question; for it recites, that where lords of fees distrain their tenants for rents and services, and they having replevied their cattle do alien or sell them, so that a return cannot be made; then it provides that the sheriff or bailiff shall take pledges to prosecute the suit before they make deliverance of the distress, and if the bailiff be not able to restore (that is, if he take insufficient pledges) the superior shall answer, by which the parliament

(*a*) 3 Co. 71. Westby's Case. See also 2. Lev. 159. 2. Jones, 62. 5. Mod. 414 Ld. Ray. 424. Salk. 272. 4. Ba. Ab. 444.

(*b*) The statute of Marleberge, 52. *Hen.* 3. c. 1.

could

could mean no other than the lord of that liberty; for if it should be otherwise there would be no end of superiors: as if there is a bailiwick in fee of a liberty, and the bailiff thereof grants it for life, in this case there are two superiors, for the lord of the bailiff is one, and the bailiff himself is another, which cannot be, 2. *Inst.* 382. There is a congruity in law in saying *the sheriff* and *lord* are superiors, but there can be none in making the reversioner a superior. The lord may lose the liberty if his bailiff for life or in fee commit a forfeiture, as by not attending the Justices in Eyre; but a reversion cannot be lost by the forfeiture of the tenant for life. If the bailiff make an ill execution of a writ or suffer the party to escape, the lord shall answer. So if the marshal of *England* appoint a marshal, there may be a forfeiture of his office, because it is still but the same office; and therefore the case in *Cro. Eliz.* 386. where it is said, "If an office be granted for life, the forfeiture of tenant for life shall be the forfeiture of the whole office," is mistaken; for in *Moor*, *pl.* 987. it is held otherwise; and upon the true difference between a deputy and a * grantee for life; for in the first case there may be a forfeiture of the superior, because it is still but the same office; but in the other case the superior shall not forfeit for any misdemeanour of the grantee for life, because he hath the freehold of the whole office, and the other nothing but the reversion; and therefore if the defendant be liable in this case, it is in respect, *First*, That he hath granted the estate: *Secondly*, That he hath the reversion or residue after the life of the grantee. He cannot be charged in respect that he hath granted the estate, because the freehold is gone and in another; neither can he be charged in respect of the reversion, because then not only his heir, but the assignee of the reversion will be chargeable also, which cannot be.—As to THE SECOND POINT of this argument; if the defendant be not chargeable by this statute, he is not to be charged at the common law; because the common law doth not give an action of debt for an escape, but an action on the case only; neither doth it give any remedy but against the party offending. As to the case that hath been objected upon the statute *de Scaccario*, where the several officers in the exchequer shall answer in their degrees of superiority, that cannot be applicable to this case, because there can be no proportion between things which concern the king's revenue and prerogative, and those of a common person. The cases of the coroner and the sheriff, and of the recommending of a receiver to the king, are not like this case, because the king cannot inform himself of the sufficiency of the party recommended, and therefore it is but reasonable that he who recommends should be liable: and can it be said, that when the defendant was about to sell this office to one *Norwood* (which he hath since done), that if a stranger had recommended *Norwood*, and he had proved insufficient, that the stranger would have been liable?—As for the civil law, and the authorities therein cited to govern this case, he did not answer them, because they judge after their law, and the common lawyers after another way. This office hath been granted, time out of mind,

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[126]

Sid. 306. 397.

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mind, for life, and no doubt but many escapes have been made, but never was any action brought against him in the reversion before now. The court of common pleas always examine the sufficiency of the grantee for life; which shews that in all succession of ages the opinions of learned men were, that no escape could be * brought against the reversioner; for if so, what need is there of
[127] such examination? This was urged to shew that the proceedings of that court did not alter but interpret the law. But admitting the case of the *Duke of Norfolk* to be law, yet it concerns not this, because the sub-marshal there was taken as a deputy, but there is no such officer as a sub-warden, for *Duckenfield* had it for life. And then a deputy being a person removable at pleasure, will not be so considered in law as one who hath a more fixed estate; for, having nothing to lose, it cannot be intended that he will be so careful in the execution of his office as the other; and therefore it is reasonable in such case, that the superior should answer: but he who hath a freehold for life, hath an estate of some value in the law, which he cannot be supposed easily to forfeit, and therefore it is reasonable that he alone should be liable for his own miscarriages; for if the defendant should be charged, by the same reason the grantee of the reversion may be charged, who is altogether an innocent person, and so may be liable to a vast sum for the fault of another: for which reasons he prayed judgment for the defendant.

THE COURT delivered no opinion this Term, but took time to advise; and afterwards, in *Easter Term* following, RAINSFORD, *Chief Justice*, delivered the opinions of TWISDEN, WYLDE, and JONES, *Justices*, who said, they were all agreeing in the main point, but thought the verdict imperfect, and not to warrant the plaintiff's case; for he declared, that at the time when the grant was made to *Duckenfield*, when the commitment was, and when the escape was suffered, and ever since, that *Duckenfield* was insufficient and not able to answer the plaintiff; but the jury in the special verdict do not find the insufficiency at that time when this action was brought.

BUT as to THE MAIN QUESTION they were of opinion, that the defendant was superior, and that he is chargeable for this insufficiency of *Duckenfield*: but if he had been sufficient when the plaintiff brought this action, it might have been otherwise; but his inability being fully averred in the declaration, and the defendant denying it, and the jury having found nothing against it, but there being strong suspicions of the truth of the fact, the Court would not make an intendment to the contrary. The jury have found expressly, that *Duckenfield* was insufficient at the time of the escape, which was within six weeks of the time when the action was commenced; so that having once
* [128] found him disabled, unless it appear that he was of ability afterwards, * the Court will not intend him so, but rather that he was insufficient at the time of the action brought; for there being strong surmises of it, and there being no ground within the record to intend him sufficient, a fact may be collected that is not found in the verdict. *Fulwood's Case*, 4. *Co.*

The King *against* Moor.

Case 85.

An information will lie in the king's bench on the 4 & 5. Phil. & Mary, c. 8. for stealing an heirefs; for although the ftatute enacts, that the CHAMBER may proceed againft offenders by plaint or information, and the Judges of affife by inquiry or indictment, yet as there are no negative words, the general jurifdiction of the king's bench is not thereby reftrained.

AN INFORMATION was brought upon the ftatute of the 4. & 5. *Phil. & Mary*, c. 8. which enacts, "That if "any perfon, &c. above the age of fourteen fhall, after the firft day "of *April* (next after the making the ftatute), unlawfully take a "maid or woman unmarried, being within the age of fixteen years, "&c. the party fhall fuffer two years imprifonment, or pay fuch "fine as fhall be affeffed in THE STAR-CHAMBER. The information charged, that the defendant, being above the age of fourteen years, did take a young maid away unmarried, and kept her three days, *contra formam ftatuti*; upon which he was found guilty; and now moved in arreft of judgment.

FIRST, It was faid *for the defendant*, that this Court could not fine him upon this ftatute; becaufe when the informer entitles himfelf by a ftatute, he muft take the remedy therein prefcribed; and fo it is not like an information at the common law, for in fuch cafe this Court might fine the plaintiff.

SECONDLY, It is not averred, that the party offending *was* above the age of fourteen years at the time of taking, but only that he *being* above the age of fourteen years fuch a day did take.

S. C. 2. Lev. 179. S. C. 1. Freem. 444. S. C. 3. Keb. 708. 715. Poft. 302. Cro. Car. 465. 1. Mod. 34. 1. Sid. 359. Ld. Ray. 991. Stra. 302. 3. Com. Dig. 510. 1. Hawk. P. C. 24. 2. Hawk. P. C. 9. 302. 2. Burr. 1042.

SIR WILLIAM JONES *contra*. If the firft objection hath any weight in it, it is to bring the party to an imprifonment for the fpace of two years, which is a punifhment directed by that ftatute, but the fine is limited to THE STAR-CHAMBER; and thofe offences which were punifhable there are likewife to be punifhed here, becaufe there are no negative words in this ftatute to abridge the authority of this court, which is never reftrained but when the ftatute directs before whom the offence fhall be tried, and not elfewhere. It was the opinion of HALE, *Chief Juftice*, that where there is a prohibitory claufe in a ftatute, and another claufe which gives a penalty, if the party will go upon the prohibitory claufe, he is not confined to the manner expreffed in the ftatute; but if he will go upon the penalty, he muft then purfue what the ftatute directs. * The firft part of this ftatute is but a declaration of *the common law*; the fecond claufe is introductive of *a new law* as to the court of STAR-CHAMBER, but is not a reftriction as to this court, which might have punifhed the defendant if there had been no fuch law. The firft claufe is prohibitory, *viz.* "that it fhall not be lawful "for any perfon to take away a maid unmarried;" and upon this claufe this information is brought. The fecond claufe is diftinct, and directs the punifhment, *viz.* "upon conviction to fuffer "imprifonment for two years." Now by taking away the court of STAR-CHAMBER this prohibitory claufe is not repealed upon which a man may be indicted without demanding the penalty; and the ftatute having directed that the offence fhall be heard and determined before the king's council in the STAR-CHAMBER, or before the Judge of affife, and no negative words to reftrain this

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court;

THE KING *against* MOOR.

court; therefore the Chief Juſtice, who is the Judge of (*a*) aſſiſe in the county of *Middleſex*, may hear and determine this offence, and by conſequence fine the party if he be found guilty.

In an information on the 4. & 5. *Phil. & Mary*, c 8. which inflicts two years imprisonment on any perſon above the age of fourteen who ſhall take away an heireſs being within the age of ſixteen years; a charge that the defendant, *being* above fourteen, &c. is a ſufficient averment that he *was* above that age.

As to THE SECOND OBJECTION, That it is not averred that the party offending was above the age of fourteen years at the time of the taking, it had been better if it had been ſaid *tunc exiſten. ſupra ætatem quatuordecim annorum*; but notwithſtanding it is well enough; for it is ſaid, that being above the age of fourteen years ſuch a day he did take, &c. ſo that it cannot be otherwiſe but that he was of ſuch an age at the time when the maid was taken: and the jury found him guilty *contra formam ſtatuti*, which may likewiſe be an anſwer to the firſt objection; for he being found guilty *contra formam ſtatuti*, if there be any other ſtatute which prohibits and puniſhes a riot, this information is as well grounded upon ſuch as upon this ſtatute of *Philip and Mary*; for it is expreſsly ſaid, that the defendant and others did unlawfully aſſemble themſelves together, and *riotosè et routosè* made an aſſault upon her, ſo that it ſhall be intended to be grounded upon ſuch a law as ſhall be beſt for puniſhing the offence.

Cro. Jac. 14. 610. 639. Moor, 606. 2. Lev. 229. 2. Roll. Rep. 262.

THE COURT were of opinion, that notwithſtanding theſe exceptions the information was good, and was not like the caſe of an indictment upon the ſtatute for a forcible entry, that ſuch a day by force and arms the defendant did enter into ſuch a houſe *exiſten. liberum tenementum* of *J. N.*; and if he doth not ſay *tunc exiſten.* the indictment is naught, becauſe the jury may enquire of a thing before it is done; but here the *exiſten.* being added to the perſon carries the ſenſe to the time of the offence committed.

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2. Lev. 229. Raym. 378. Ld. Ray. 610. Stra. 10. 44. 9. Mod. 68. 12. Mod. 516. Comyns, 27. 3. Bac. Ab. 102. 1. Burr. 832. 864. Cowp. 672. 683. 1. Term Rep. 70.

* The ſtatute of 1. *Rich.* 3. c. 12. ſaith, that all grants made by *ceſtui que uſe* being of full age ſhall be good againſt him and his heirs; and it is adjudged 16. *Hen.* 7. that he need not ſhew when and where, but generally *exiſten.* of full age; and upon the evidence it muſt be ſo proved. Where a thing relates to the condition of a man, it ſhall be tried in the county where the action is laid; and it is not neceſſary to ſay in what county he is a *knight* or an *eſquire*. Any citizen and freeman may deviſe his land *in mortmain* by the cuſtom of *London*; it is enough to ſay in pleading *exiſten.* a citizen and freeman, without ſetting forth when and where. If a man be indicted for not coming to church, it is enough to ſay *exiſten.* of the age of ſixteen years he did not come to church. This is an offence puniſhable at common law; it is *malum in ſe* (*b*). But admitting it was an offence created by the ſtatute, there being no negative words to prohibit, this court hath a juriſdiction to puniſh this offence if the STAR-CHAMBER had not been taken away; for the

(*a*) Cro. Car. 465. 8. Mod. 6. 8. 96. 11. Mod. 113. 161. Ld. Ray. 72.

(*b*) So adjudged in Rex *v.* Twiſleton, 1. Lev. 257. 1. Sid. 387. 2. Keb. 432 438. and in Rex *v.* Lord Offalſtone, 2. Strange, 1107. Andr. 310.; but in Rex *v.* Marriott, 4. Mod. 125. HOLT, *Chief Juſtice*, ſays, it is not an offence at common law.—*Note to the* FOURTH EDITION.

party

party had his election to proceed in this court upon the prohibitory clause, and the Justices of assise must be intended the Justices of *oyer* and *terminer*, *Moor*, 564.

THE KING *against* MOOR.

Whereupon the defendant was fined five hundred pounds, and bound to his good behaviour for a year.

Brown *against* Waite.

Case 86.

If a statute enact, that "all "manors, mes-"suages, lands, "tenements, "possessions, "reversions, "remainders, "rights, inte-"rests, &c. and "other things, "*of what na-"ture soever*," shall be forfeited on an attainder of high treason, *lands in tail* are forfeited; for they shall be included in the general words, "other things, "of what na-"ture soever."

UPON A SPECIAL VERDICT IN EJECTMENT, the case was thus: *Sir John Danvers*, the father of the lessor of the plaintiff, was, in the year 1646, tenant in tail of the lands now in question; and was afterwards instrumental in bringing the late *King Charles* to death, and so was guilty of HIGH TREASON; and died. Afterwards the act of pains and penalties, made 13. *Car.* 2. c. 15. enacts, "that all the lands, tenements, and here-"ditaments, which *Sir John Danvers* had the 25th day of *March* "in the year 1646, or at any time since, shall be forfeited to the "king."

The question was, Whether these entailed lands shall be forfeited to the king by force of this act?

WALLOP, *who argued for the plaintiff*, said, that the entailed lands were not forfeited. His reasons were, * FIRST, These lands entailed are not expresly named in that act.—SECONDLY, Tenant in tail hath but an estate for life in his lands, and therefore by these words, "all his lands," those which are entailed cannot be intended; for if he grant *totum statum suum*, only an estate for life passeth.—THIRDLY, These lands are not forfeited by the statute of 26. *Hen.* 8. c. 13. which gives the forfeiture of entailed lands, in case of treason; because *Sir John Danvers* was not *convicted* of it by "process, presentment, confession, verdict, or "outlawry," which that statute doth require, for he died before any such conviction.

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S. C. 2. Lev. 169.
S. C. 2. Jones, 57.
S. C. 1. Vent. 299.
S. C. Pollexf. 185.
S. C. 3. Keb. 459. 651. 688. 712.
Co. Lit. 3.
2. Inst. 75. 334. 429.
3 Inst. 64. 108.
9. Mod. 178.
10. Mod. 121. 367.
Kely. 42.
Gilb. Uses, 3.
Yorke on Forfeitures, 79. to 82.
2. Bac. Abr. 581.
2. Hawk. P. C. 644.

SIR FRANCIS WINNINGTON, *the King's Solicitor*, argued *contra*, that entailed lands are forfeited by the act of pains and penalties; and in speaking to this matter, he considered, FIRST, The words of that act; and SECONDLY, How estates-tail were created; and how forfeitable by treason.—FIRST, This act recites the act of general pardon, which did not intend to discharge the lands of *Sir John Danvers* and others from a forfeiture. It recites that he was guilty of high treason. Then comes the enacting clause, *viz.* "that all the lands, tenements, rights, in-"terests, offices, annuities, and all other hereditaments, leases, "chattels, and other things of what nature soever, of him the "said *Sir John Danvers* and others, which they had on the 25th "of *March* 1646, or at any time since, shall be forfeited to the "king, his heirs and successors."—SECONDLY, As to the creation of intails, there were no such estates at the common law; they were all fee-simple conditional, and *post prolem suscitatam* the condition was performed for three purposes, *viz.* To alien, *Co. Lit.* 19. a.

Brown against Waite.

19. a. 2. *Inst.* 334. To forfeit; or, To charge with a rent; and thus the law continued till 13. *Edw.* 1.; and there having been frequent wars between King John and the Barons, the great men then obtained the statute *de donis* to preserve their estates, lest the like occasion should happen again; in which it is only mentioned, that the tenant in tail should not have power to alien; but it was well known, that if he could not alien he could not forfeit; for before that statute, as he might alien *post prolem suscitatam*, so the Judges always construed that he might forfeit, 5. *Edw.* 3. 14.; for forfeiture * and alienation did always go hand in hand. 1. *Co.* 175. *Mildmay's Case.* And from the making of that statute it always continued a settled and received opinion, that tenant in tail could not alien, until by the twelfth year of *Edward the Fourth* a recovery came in, by which the estate-tail may be docked, and which is now become a common assurance. Then by the statute of 4. *Hen.* 7. c. 24. tenant in tail might bar his issue by fine and proclamation; and all this while it was not thought that such lands could be forfeited for treason; which opinion continued during all the reign of *Henry the Seventh*; for though by his marriage the Houses of *York* and *Lancaster* were united, yet the great men in those days thought there might be some doubt about the succession after the death of *Henry the Seventh* if he should die without issue, and thereby those differences might be again revived; and therefore no endeavours were used to make any alteration in the law till after the death of *Henry the Seventh*. And after his son *Henry the Eighth* had issue those doubts were removed; and being never likely to rise again, then the act of 26. *Hen.* 8. c. 13. was made, which gives a forfeiture of entailed lands in cases of treason. The inference from this will be, that all the cases put before the twenty-sixth year of *Henry the Eighth*, and so before entailed lands were made forfeitable for treason, and where by the general words of "lands, tenements, and hereditaments," it was adjudged entailed lands did not pass, do not concern this case; but now since they are made forfeitable by that statute, such general words are sufficient to serve the turn. By the statute of 16. *Rich.* 2. c. 5. entailed lands are not forfeited in a *præmunire* but during the life of tenant in tail; because they were not then to be forfeited for treason, *Co. Lit* 130. If then it appear, that the crime of which *Sir John Danvers* was guilty was treason, and if entailed lands are forfeited for treason, then when the act saith, "that he "shall forfeit all his lands," by those general words his entailed lands shall be forfeited: and though by the common law there can be no attainder in this case, the party being dead; yet by act of parliament that may be done; and the words in this act amount to an attainder. The intent of it was to forfeit estates tail, which may be collected from the general words; for if a fee-simple be forfeited, though not named, why not an estate-tail? especially since the word "hereditaments" is very comprehensive, and may take in both those estates. *Spelman's Glossary*, 227. 2. *Roll. Rep.*

Co. Lit. 21. 392. 2. Inst. 335. Moor, 155.

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Taltarum's Case. See the Year Book 10. *Edw.* 4. pl. 14. Hard. 209.

See 2. Hawk. P. C. 640.

Co. Lit. 3. 2. Inst. 334.

Dyer, 322. Staundf. 187. Co. Lit. 372. 391. Hob. 340. 2. Hawk. P. C. 642. 1. Hale, P. C. 243.

Rep. 503. * In the very act of 26. *Hen.* 8. c. 13. eſtates-tail are not named; for the words are, "Every offender convict of treaſon, "&c. ſhall forfeit all ſuch lands, tenements, and hereditaments, "which he ſhall have of any eſtate of inheritance, in uſe, poſſeſſion, "or by any right, title, or means, &c.;" and yet a conſtruction hath been made thereupon in favour of the crown; ſo a dignity of an earldom intailed is forfeitable by this ſtatute by the word "hereditament," 7. *Co.* 34. BROWN *against* WAITE.

RAINSFORD, *Chief Juſtice*, afterwards in *Hilary Term*, delivered the opinion of THE COURT, That upon conſtruction of the act of pains and penalties this eſtate-tail was forfeited to the king. He agreed the ſeries and progreſs of eſtates-tail to have been as argued by THE SOLICITOR; and that the queſtion now was, Whether by the act of pains, &c. eſtates-tail can be forfeited unleſs there are expreſs words to take away the force of the ſtatute *de bonis conditionalibus?* for by that ſtatute there was a ſettled perpetuity; tenant in tail could neither forfeit or alien his eſtate, no not in caſe of treaſon, and forfeiture is a kind of alienation; but afterwards by the reſolution in the time of *Edward the Fourth* an alienation by a common recovery was conſtrued to be out of the ſaid ſtatute, and by the ſtatute of fines, 4. *Hen.* 7. c. 24. which is expounded by a ſubſequent ſtatute of 32. *Hen.* 8. c. 36. tenant in tail notwithſtanding his former reſtraint had power to alien the eſtate-tail and bar his iſſue. But all this while his eſtate was not to be forfeited for treaſon, till the ſtatute of 33. *Hen.* 8. c. 20. which gives "uſes, rights, entries, conditions, as well as poſſeſſions, reverſions, remainders, and all other things of a perſon attainted of "treaſon by the common or ſtatute law of the realm, to the king, "as if ſuch attainder had been by act of parliament." Then by the ſtatute of 5. & 6. *Edw.* c. 11. it is enacted, "that an offender being guilty of HIGH TREASON and lawfully convict, "ſhall forfeit to the king all ſuch lands, tenements, and hereditaments, which he ſhall have of any eſtate of inheritance in his "own right in uſe or poſſeſſion." By which ſtatutes that of *de donis conditionalibus* was taken off in caſes of treaſon, as it had been before by the reſolution in the twelfth year of *Edward the Fourth*, and by the ſtatute of fines, as to the alienation of an eſtate-tail by fine and recovery. If therefore this act of pains, &c. will admit of ſuch a conſtruction as to make eſtates-tail forfeit, here is a crime great * enough to deſerve ſuch a great puniſhment; a crime for which the parliament hath ordered an anniverſary to be kept for ever, with faſting and humiliation, to implore that the guilt of that innocent blood then ſhed may not be required of our poſterity; this they eſteemed as another kind of original ſin, which unleſs thus expiated might extend not only *ad natos ſed qui naſcantur ab illis.*

Preface to 3. Co.

See 2. Hawk. P. C. 641.

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And that this act will admit of ſuch a conſtruction theſe reaſons were given:

FIRST,

Brown against Waite.

10. Mod. 94. 287. Ld. Ray. 187.

First, From the general comprehensive words mentioning those things which are to be forfeited, *viz.* "messuages, lands, "tenements, reversions, and interests;" which last word signifies the estate in the land as well as the land itself, or otherwise the word must be construed to have no effect.

Co. Lit. 334

Secondly, Estates-tail are not now protected by the clause in the statute *de donis*, *non habet potestatem alienandi*, but are subject to the forfeiture by the act of 33 *Hen.* 8. c. 20. which though it extend to *attainders* only, yet it is a good rule for the Judges to make a construction of an act of parliament by; especially in such a case as this, wherein it is plain that the law did look upon these offenders, if not attainted, yet *in pari gradu* with such persons, and therefore may be a good warrant to make the like construction as in cases of attainder.

Thirdly, Because the offenders are dead; for had they been living, there might have been better reason to have construed this act not to extend to estates-tail, because then something might be forfeited, *viz.* an estate for life; and therefore the act would signify very little if such construction could not be made of it to reach estates-tail of such persons who were dead at the time of the making the law, especially since it is well known that when men engage in such crimes they give what protection they can to their estates, and place them as far as they can out of danger.

Fourthly, It appears by the act, that the law-makers did not intend that the children of such offenders should have any benefit of their estates, because in the proviso there is a saving of all estates of purchasors for money *bonâ fide* paid; and therein also a particular exception of the wife and children and heirs of the offenders; and if the act would not protect the estate of the children, though they should be purchasors for a valuable consideration, it will never protect their estate under a voluntary conveyance made by the ancestor; especially in this case, because the entail carries a suspicion with it that it was designed with a prospect to commit this
* [135] crime; for *Sir John Danvers* was * tenant in tail before, and in the year 1647 levies a fine to bar that entail, and then limits a new estate-tail to himself, in which there is a provision to make leases for any number of years upon what lives soever, in possession or reversion, with rent or without it; and this was but the year before the crime committed.

Fifthly, The proviso in the act for saving the estates of purchasors doth protect all conveyances and assurances, &c. of land "not being the lands of the late king, queen, prince, &c. and not "being land sold for any pretended delinquency since the first of "*June* 1641, and all statutes and judgments suffered by the "offenders from being impeached;" from which it appears, that the parliament looked upon entailed lands as forfeited; for if estates made to others upon a valuable consideration had need of a proviso to save them from forfeiture, *à fortiori* the estates out of which

which those are derived have need of such a saving, and therefore must be forfeited by the act; for which reasons these lands are forfeited. *Brown against Waite.*

As to the great objection which hath been made and insisted on the other side, and which is *Trudgeon's Case*, 22. *Eliz. Co. Lit.* 130. where tenant in tail was attainted in a *præmunire*, and it was adjudged, that he should forfeit his land but during his life, for though the statute of 16. *Rich.* 2. c. 5. enacts, "that in such case "their lands, tenements, goods, and chattels, shall be forfeited to "the king," yet that must be understood of such an estate as he may lawfully forfeit, and that is during his own life, and therefore being general words they do not take away the force of the statute *de donis*, so that his lands in fee simple for life, &c. shall be forfeited, but the land entailed shall not, during his life; the answer is plain for in the reign of *Richard the Second*, when the statute of *præmunire* was made, estates-tail were under a perpetuity by the said statute *de donis*, which statute is now much weakened in the point of alienation, and the law is quite altered since that time, and it is apparent by multitude of precedents, that such strict constructions have not been made since that time to preserve estates tail from forfeitures without special and particular words. and therefore in the case of *Adams v. Lambert*, which is a case in point, the Judges there construed estates-tail to be forfeit, for want of special words in the statute of 1. *Edw.* 6. c. 14. to save it, and that was only a law made for suppressing of *superstitious uses* upon a politic consideration, but this is a much greater offence intended to be punished by this act, in which there are demonstrations both from the words and intent of the law-makers to make this estate forfeited to the crown than in that case so much relied on. 4. Co. 164. * [136]

And judgment was given accordingly.

WYLDE, *Justice*, died before judgment was given; but TWISDEN, *Justice*, said, he was of that opinion, and JONES, *Justice*, concurred.

Basset *against* Salter. Case 87.

AN ACTION FOR AN ESCAPE.—The question was, Whether the plaintiff may take out a *capias ad satisfaciendum*, or have a *fieri facias* against the defendant, after the sheriff or gaoler voluntarily suffer him to escape?

But THE COURT would not suffer it to be argued; because it had been lately settled, that it was at the election of the plaintiff to do either: and upon a writ of error brought in the exchequer chamber the Judges there were of the same opinion. but in the Lord Chief Justice VAUGHAN's time the court of common pleas were divided, but it is since settled, 1. *Roll. Abr.* 901, 902.

If the sheriff suffer a voluntary escape, the creditor may have, at his election, a new action against the sheriff, or a *scire facias* against the debtor.

S. C. 1. Freem. 213.

1. Ven. 4. 269. T. Jones, 21. 12. Mod. 250. Cases Temp. Hal'. 222. Stra 423. 531. 873. 901. Ld. Ray. 555. 7 & 977. 1020. 3. Com. Dig. "Escape" (L). 2. Bac. Abr. 240. 4. Burr. 2487. 1. Term Rep. 559. 3. Term R p. 338.

BASSET *against* SALTER.

If there be an eſcape by the plaintiff's conſent, though he did not intend it, the law is hard that the debt ſhould be thereby diſcharged; as where one was in execution in THE KING'S BENCH, and ſome propoſals were made to the plaintiff in behalf of the priſoner, who, ſeeing there was ſome likelihood of an accommodation, conſented to a meeting in *London*, and deſired the priſoner might be there, who came accordingly; and this was held to be an eſcape with the *(a)* conſent of the plaintiff, and he could never after be in execution at his ſuit for the ſame matter *(b)*.

(a) If it had been by the conſent of the ſheriff, he could never take him again, but the plaintiff might. Sid. 330.—*Note to the* FOURTH EDITION.

(b) By 8. & 9. *Will.* 3. c. 27. "If "any priſoner in execution ſhall eſcape, "by any ways or means howſoever, the "creditor at whoſe ſuit ſuch priſoner "was charged in execution at the time of his eſcape may retake ſuch priſoner by any new *capias* or *capias ad ſatisfaciendum*, or ſue forth any other kind of execution on the judgment, as if the body of the priſoner had never 'been taken in execution." See the caſe of Allanſon *v.* Butler, 1. Sid. 330. and Buxton *v.* Horne, 1. Show. 174.

MICHAELMAS

MICHAELMAS TERM,

The Twenty-Eighth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*
Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.* } *Justices.*
Sir William Scroggs, *Knt.*
Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Peck *against* Hill. Case 88.

To *debt* upon bond against an *administrator*, the defendant may plead, that he gave another bond *in his own name* in discharge of the first bond.

DEBT UPON A BOND brought against the defendant as administrator, who pleads that he gave another bond in his own name in discharge of the first bond: and upon issue joined it was found for the defendant.

It was moved that judgment might not be entered hereupon, because it was a bad plea.

* [137]

S. C. 1. Mod. 221. 225. 3. Lev. 55. *cont. a.* Gilb. Eq. Rep. 89. 10. Mod. 224. 306. 438. 12. Mod. 86. 248. 537.

* But NORTH, *Chief Justice*, and WYNDHAM and SCROGGS, *Justices*, were of opinion that it was a good plea, because there was other security given than what the plaintiff had before; for upon the first bond he was only liable *de bonis intestatoris*, but now he might be charged in his own right, which may be well said to be in full satisfaction of the first obligation; for where the condition is for payment of money to the party himself, there if he accept any collateral thing in satisfaction, it is good. If a security be given by a stranger, it may discharge a former bond, and this in effect is given by such: and it is not like the case in *Hobart (a)*,

1. Peer. Wms. 324. 2. Peer. Wms. 343. 553. (614). (616). 3. Peer. Wms. 225. 245. 1. Stra. 426. 573. 615. 1. Ld. Ray. 60. 122. 566. 5. Com. Dig. "Pleader" (2. W. 46). Cowp. 47. 128. Co. Lit. 122. b.

(a) Hob. 68.

PECK *against* HILL.

where a bond was given by the same party upon the very day a former bond was payable, and adjudged not a good discharge; for the obligee was in no better condition than he was before.

Cro. Car. 85. See the case of Meafe, Executrix, *v.* Meafe, Cowp. 47.

ATKINS, *Justice*, doubted, but inclined that one bond cannot be discharged by giving another, though the discharge be applied to the condition of the bond; and for this he cited *Cro. Eliz.* 716. 727. which was a case adjudged so in point; and therefore this plea upon demurrer should have been over-ruled.

A verdict will not cure an *immaterial issue*, but it will cure an *informal issue*. Post. 139. Lev. 32. Carth. 371. 8. Mod. 356 380. 10. Mod. 19. 11. Mod. 2. Stra. 313. 933. 1011. Ld. Ray. 168. 4. Bac. Abr. 56. 127. 1. Bac. Abr. 103. Cowp. 455. 826. 1. Term Rep 140. Dougl. 97.

Yet since issue was taken upon it, and a verdict for the defendant, the plea is helped by the statute of *Jeofails*, 32. *Hen* 8. c. 30. here being a direct affirmative and negative. But as to that, NORTH, *Chief Justice*, and SCROGGS, *Justice*, replied, that an *immaterial issue*, no ways arising from the matter, is not helped; as an action of debt upon a bond laid to be made in *London*, and the defendant saith that it was made in *Middlesex*, and this is tried, it is not aided by the statute, but there must be a repleader.

One bond cannot be given by the same obligor in discharge of another.

But because it was sworn that the obligor (who was the intestate) was alive four years after the time that the second bond was given, and for that reason it could not be given upon the account of the defendant's being liable as *administrator*, but must be intended a bond to secure a debt of his own, therefore a new trial was granted.

*[138]

Case 89.

Cook and Others *against* Herle.

Covenant will lie in the personalty, though the grant be executed by the statute of Uses, which makes a distress the proper remedy.

S. C. 1. Mod. 223. 10. Mod. 158. 11. Mod. 45. 12. Mod. 74. 45. 166. 171. 371. 384. 399. Stra. 230. 763. 1085. 1221. Ld. Ray. 322. 554. 5 Com Dig. 41. Bull N.P. 1. Bac. Ab. 547. 3. Term Rep. 393.

COVENANT.—The case was this: *Charles Cook* made a jointure to *Mary* his wife for life, and died without issue. The land descended to *Thomas Cook*, his brother and heir, who grants an annuity or rent-charge of two hundred pounds *per annum* to the plaintiffs in trust for *Mary*, and this was to be in discharge of the said jointure, "HABENDUM to them, their heirs, executors, administrators, and assigns, in trust for the said *Mary* for "life," with a clause of distress, and a covenant to pay the two hundred pounds *per annum* to the said trustees for the use of the said *Mary*. The breach assigned was, that the defendant had not paid the rent to them for the use of *Mary*.

The defendant demurred specially, For that it appears by the plaintiff's own shewing, that here is a grant of a rent-charge for life, which is executed by the statute of uses, and therefore there ought to have been a distress for non-payment, which is the proper remedy given by the statute, and this action will not lie in the personalty.—SECONDLY, It is said, the defendant did not pay it to the plaintiffs for the use of *Mary*, which is *a negative pregnant*, and implies that it was paid to them.—THIRDLY, It is not averred that the money was not paid to *Mary*; and if it is paid to her, then the breach is not well assigned.

But

But BALDWIN, *Serjeant, for the plaintiff*, replied, that it was not a question in this case, whether this rent-charge was executed by the statute or not, for *quâcunque viâ datâ* an action of covenant will lie; and that the breach was assigned according to the words of the covenant, and so *primâ facie* it is well enough; for if the defendant did pay the money to the plaintiffs he may plead it, and so he may likewise if he paid it to *Mary*. COOK AND OTHERS *against* HERLE.

THE COURT were all of opinion, that this rent-charge was executed by the statute of uses by the express words thereof, which executes such rents granted for life upon trust, as this case is, and transfers all rights and remedies incident thereunto, together with the possession, to *cestuy que use*; so that though the power of distraining be limited to the trustees by this deed, yet by the statute, which transfers that power to *Mary*, she may distrain also; but this covenant being collateral cannot be transferred. * The clause * [139] of distress, by the express words of the act, is given to the *cestuy que use*; but here is a double remedy, by distress or action; for if the lessee assign his interest, and the rent is accepted of the assignee, yet a covenant lies against the lessee for non-payment upon the express covenant to pay (*a*): so if a rent be granted to *S*. and a covenant to pay it to *A*. for his use, it is a good covenant.

And IT WAS AGREED, that the assignment of a breach according to the words of the covenant is good enough, and that if any thing be done which amounts to a performance, the other side must plead it; as in this case the defendant might have pleaded that the money was paid to *Mary*, which is a performance in substance, but it shall not be intended without pleading of it.—

Whereupon judgment was given for the plaintiff.

Comyns, 89. 146. 2. Barnes, 284. 8. Mod. 231. 318. 10. Mod. 149. 158. 227. 443. 11. Mod. 78. 133. 12. Mod. 248. 327. 413. Stra. 227. Ld. Ray. 106. 124.

(*a*) See Hayes *v.* Bickerstaff, ante, 34. and Hollis *v.* Carr, ante, 86.

Read *against* Dawson. Case 90.

In debt on bond against the defendant as executor, if issue be joined whether he had assets on a particular day, it is an *immaterial issue*, and on verdict for the defendant *a repleader* shall be awarded.

DEBT UPON BOND against the defendant as executor: issue was joined, whether the defendant had assets or not on the thirtieth day of *November*, which was the day on which he had the first notice of the plaintiff's original writ; and it was found for the defendant, that then he had not assets.

It was moved for *a repleader*, because it was said that this was *an immaterial issue*; for though he had not assets then, yet if he had any afterwards he is liable to the plaintiff's action.

But BARREL, *Serjeant*, moved for judgment upon this verdict, by reason of the statute of 32. *Hen.* 8. c. 30. which helps in cases of *mispleading* or *insufficient pleading*. It is true, there are many cases which after verdict are not aided by this statute; as if there are two affirmatives, which cannot make an issue; or when after

Hard. 331. Ante, 137. Yelv. 210. Hob. 126.

Cro. Eliz. 883. 1. Lev. 32. Cro. Car. 78. 11. Mod. 46. 2. Lev. 164. Stra. 394. 847. 994. Ld. Ray. 134. 169. 3,1. 797. 923. 1. Burr. 292. 5. Com. Dig. "Pleader" (R. 15.). 4. Bac. Ab. 126. Dougl. 3,6. 747.

 a traverse

READ against DAWSON.

a traverse issue is joined with an *hoc petit quòd inquiratur per patriam*, this is no issue, 2. *And.* 6. & 7. So if there be no plea at all; as if an action be brought against husband and wife, and she pleads only, *Cro. Jac.* 288. So if the party put himself *super patriam* where it should be tried by *record*, or if the plea be nothing to the purpose, or lie not in the mouth of the parties; such immaterial issues as these cannot be good. The difference in *Moor*, 867. is, that if the plea on which the issue is joined, hath no colourable pretence in it to bar the plaintiff, or if it be against an express rule in the law, there the issue is *immaterial*, and so as
* [140] if there were no issue; and therefore it is * not aided by the statute; but if it hath the countenance of a legal plea, though it want necessary matter to make it sufficient, there shall be no *repleader*, because it is helped after verdict. Here the parties only doubt whether there were assets at the time of the notice, and it is found there were none. And so judgment was to be given accordingly.

THE WHOLE COURT were of that opinion.

But ATKINS, *Justice*, was clear, that if the parties join in an *immaterial issue* there shall be no *repleader*, because it is helped after verdict by these words in the statute, *viz.* "any issue;" it is not said an issue joined upon a material point; and the intent of the statute was to prevent *repleaders*; and that if any other construction should be made of that act, he was of opinion that the Judges sat there not to expound but to make a law; for by such an interpretation much of the benefit intended by the act to the party who had a verdict, would be restrained.

THE OTHER JUSTICES were all of opinion, that since the making of this statute it had been always allowed, and taken as a difference, that when the issue was perfectly *material* there should be no repleader; but that it was otherwise where the issue was not material.

And SCROGGS, *Justice*, asked merrily, if debt be brought upon a bond, and the defendant plead that *Robin Hood* dwelt in a wood, and the plaintiff join issue that he did not, this is an *immaterial issue*, and shall there not be a repleader in such case after verdict? *Ad quod non fuit responsum.*

Case 91.

Beaumont *against* ——

The defendant cannot wage his law in an action of debt on a judgment in an inferior court.

Co. Lit. 295.

THE PLAINTIFF brings an action of debt upon a judgment obtained against the defendant in a court baron, having declared there in an action on the case upon an *assumpsit*, and recovered.

The defendant came to *wage his law*, and was ready to swear that he owed the plaintiff nothing.

Cro. Eliz. 750. 2. Vent. 171. 1. Sid. 366. 8. Mod. 303. 11. Mod. 187. 12. Mod. 598, 669. 676. Ld. Ray. 211. 230. 500. 796. 992. 1040. 5. Com. Dig. "Pleader" (2. W. 45). 5. Bac. Abr. 430.

But

But THE COURT held that he was not well advised; for by the recovery in the inferior court it became now a debt, and was owing. And being asked, Whether he had paid the money? he answered that he owed nothing: whereupon the Court concluded that he had not paid it, and therefore they would not admit him to *wage his law* without bringing sufficient * *compurgators* to swear that they believed he swore truth: but such not appearing, the defendant *defecit de lege*, and judgment had been given against him; but he offered to bring the money recovered and the costs into the court, and to go to a new trial, it being a very hard case upon him at the former trial, where the demand was of a quit-rent of eighteen pence *per annum*; the defendant promised, that if the plaintiff would shew his title and satisfy him that he had a right to demand it, he would pay him the rent; and at the trial express oath was made of a promise to pay, upon which the verdict was obtained; whereas it was then urged that the freehold would come in question upon that promise, and so the inferior court could have no jurisdiction.

BEAUMONT *against* —

*[141]

And afterwards NORTH, *Chief Justice*, said, that it hath been adjudged in the king's bench, that an inferior court cannot hold plea on a *quantum meruit* for work done out of the jurisdiction, though the promise be made within (*a*); and that he knew where a person of quality intending a marriage with a lady, presented her with a jewel; and the marriage not taking effect, he brought an action of *detinue* against her, and she taking it to be a gift offered to *wage her law*; but the Court was of opinion that the property was not changed by this gift, being to a specifical intent, and therefore would not admit her to do it. QUOD NOTA.

(*a*) See the case of Trevor *v.* Wall, 1. Term Rep. 151.

Styleman *against* Patrick. Case 92.

AN ACTION ON THE CASE was brought by the plaintiff against the defendant for eating of his grass with his sheep, so that he could not in *tam amplo modo* enjoy his common; and there was a verdict for the plaintiff.

The statute 22. & 23. *Car.* 2. c. 9. s. 149. which gives no more costs than damages, where the damages are under forty shillings, unless the Judge certifies that *a title* was principally in question, does not extend to an action for disturbance of common.

It was now moved, That he should have no more *costs* than *damages*; because this was a *trespass* in its own nature, and the Judge of assise had not *certified* that the title of any land was in question.

But THE COURT were all of opinion, that this case was not within the statute. For it was not a frivolous action, because a little damage done to one commoner, and so to twenty, may in the whole make it a great wrong. If the cause were frivolous, the Judge of assise may mark it to be such by virtue of the statute of 43. *Eliz.* c. 6. and then there shall be no more costs than damages; and though in this case the plaintiff hath in his declara-

S. C. 1. Freem. 214.
1. Vent. 256.

2. Vent. 36. Ray. 487. 2. Jones, 232. Gilb. C. P. 263. 3. Mod. 39. 8. Mod 198 219. 2. Barnes, 99. 108. 127. Fitzg. 42. Stra. 192. 534. 55 624. 633 645. 726. 1130 1163. Ld. Ray. 395. 566, 1. Salk. 207. 2. Com. Dig. "Costs" (A. 3.). 1. Bac. Abr. 512. 514. Dougl. 107.

STYLEMAN *against* PATRICK. tion set out a title to his common, yet the title of the * land cannot possibly come in question, and therefore not to be certified as in cases of trespass; neither is there any need of a certificate, if it appear by the pleading that the title of the land is in question.

Ld. Ray. 334. 1134. THE COURT being against the defendant as to the costs, his counsel then moved in arrest of judgment, Because the plaintiff sets forth his right to the common only by way of recital with a *cumque etiam*, &c. that he had a right to common in such a place.

Sed non allocatur; for it is affirmative enough, and afterwards he is charged with doing the plaintiff damage; and so the case is not like to an action of trespass *quare cum* he did a trespass, for there the sense is imperfect.

HILARY TERM,

The Twenty-Eighth and Twenty-Ninth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice*.

Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.*
Sir William Scroggs, *Knt.* } *Justices*.

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Case 93.

* James *against* Johnson.

TRESPASS.—The defendant justified by a prescription to have toll; and issue being joined thereupon, the jury found a special verdict, in which the case upon the pleadings was thus:

In prescribing for *toll*, the particular kind of toll must be stated; for if it be *toll-thorough* a consideration must be laid, but if it be *toll-traverse* a consideration is implied.

Before the dissolution of priories, the manor now in the possession of the defendant was parcel of the priory of *B.* which came to the crown by the said dissolution; and the king made a grant thereof to *Sir Jervas Clifton* in fee, together with the said toll *adeo plene* as the prior had it; and the defendant having brought down a title by several mesne assignments, claims by virtue of a lease from *Sir Jervas* for seven years then in being, alledging that the said *Sir Jervas* and all those whose estate he had might take toll.

S. C. 1. Mod. 231.
3. Lev. 425.
2. Lutw. 1519.
Ld. Ray. 385.
2. Wils. 296.
1. Term Rep. 660.

And, Whether this pleading by a *que estate* to have right of toll was good in law? the jury doubted.

BALDWIN, *Serjeant, for the plaintiff*, argued, that the justification was not good, because there are two sorts of toll, *viz. toll thorough* and *toll traverse*; and one is in the king's high-way, and the other in a man's own soil, and it doth not appear for which the defendant

JAMES against JOHNSON.

defendant hath justified. If it be for the first, then he ought to shew that he did make a causeway, or some other thing that might be an advantage to the passengers, to entitle himself to a prescription; but if it be for the other, then he must also shew it was for passing upon his soil, which implies a consideration, 22. *Assise*, *Keilw.* 148. *Pl. Com.* 236. *Lord Berkley's Case.* 1. *Cro.* 710. *Smith v. Sheppard*; by which cases it appears that the justification ought to be certain (*a*).

* [144]

Toll, or any other profit *à prendre*, may be appurtenant to a manor, and may be claimed by alledging a *que estate* in the manor.

* Then as to THE POINT IN QUESTION, he said, that toll cannot be appurtenant to a manor, and so the pleading by a *que estate* is not good; but if that should be admitted, yet the manor being vested in the crown by the dissolution, the toll then became in gross, and could never after be united to the manor, or appurtenant thereunto.

S. C. 1. Mod. 235. 10. Mod. 260. 12. Mod. 138 147. Stra. 1171. Ld. Ray. 44.

But it was argued *for the defendant* by MAYNARD, *Serjeant*, and THE WHOLE COURT were clear of opinion, that the issue was upon a particular point, and the title was admitted, and that nothing remained in question but the point in pleading. And as to what had been objected, that toll cannot belong to a manor, it is quite otherwise; for an advowson, a rent, a toll, or any profit *à prendre* may be appurtenant to it. It is true, a man cannot prescribe by a *que estate* of a rent, advowson, toll, &c. but he may of a manor to which these are appendant. It is likewise true, that if the defendant had said this was toll for passing the highway, he must shew some cause to entitle himself to the taking of it, as by doing something of public advantage (*b*).

Toll may be prescribed for generally. Cowp. 46. 1. Ter. Rep. 660.

But this general way of pleading is the most usual, and so are the precedents, and it ought to come on the other side, and to be alledged, that the defendant prescribed for toll in the highway.

If toll be appurtenant to a manor, the appurtenancy is not destroyed by the manor coming to the crown. Co. Lit. 121. 1. Roll. Abr. 230. 232. 1. Com. Dig. 376.

And in this case, though the manor came to the crown, the toll remained appurtenant still, and so it continued when it was granted out. The difference is between a thing which was originally a flower of the crown, and other things which are not, as *catalla felonum*, &c. If such come again to the king, they are merged in the crown; but it is otherwise in cases of a leet, park, warren, toll, &c. which were first created by the king. 9. *Co.* *Abbot de Strada Marcella's Case.* So that this toll is not become in gross by the dissolution.

JUDGMENT was given for the defendant.

(*a*) See the case of Cotton *v.* Smith, Cowper, 47.

(*b*) Jones, 162. Moor, 575. 1. Mod. 47. 4. Mod. 320. 1. Sid. 454. Cro. Eliz. 711. 5. Com. Dig. 547.

Sir

Sir William Turner's Case. Case 94.

DEBT *qui tam, &c.* for one hundred pounds against *Sir William Turner*, being a justice of peace in *London*, for denying his warrant to suppress a seditious conventicle of one *Mr. Turner*, in *New-street*.

In general no *amendment* shall be made after issue joined.

S. C. 1. Freem. 221. 1. Barnes, 3. 2. Barnes, 22. 256. 10. Mod. 88. 11. Mod. 192. 230. 233. 12. Mod. 107. 248. 274. 312. 369. 402. 598. Fitzg. 193. Stra. 185. 739. 871. 911. 1026. 5. Com. Dig. 18. Dougl. 114. 135. 2. Term Rep. 707. 3. Term Rep. 349. 659. 749.

This cause was to be tried by *nisi prius* this Term before THE CHIEF JUSTICE.

And now the plaintiff moved to amend one word in the declaration wherein he was mistaken; for he had laid the meeting to be at *Turner's* * mansion-house, and upon enquiry he understood the place of meeting was not at his mansion-house, but at a little distance from it; and so prayed the word "mansion" might be struck out.

* [145]

But THE CHIEF JUSTICE said, that after issue joined, and the cause set down to be tried, and this being a penal statute, no precedent could be shewn of an amendment in such case *(a)*, and therefore would not make this the first.

And so leave was given to the plaintiff to discontinue upon payment of costs.

(*a*) But see Goff *v.* Popplewell, Dougl. 114. *notis*, that there is no difference between *civil suits* and *penal actions* as to amendments at common law.—See also Bonefield *v.* Milner, 2. Burr. 1098. and Mace *v.* Lovet, 5. Burr. 2833. Richards *v.* Brown, Dougl. 114. that amendments are allowed after issue joined.

HILARY TERM,

The Twenty-Eighth and Twenty-Ninth of Charles the Second,

I N

The King's Bench.

Sir Richard Rainsford, *Knt. Chief Justice.*

Sir Thomas Twifden, *Knt.*
Sir William Wylde, *Knt.*
Sir Thomas Jones, *Knt.*
} *Justices.*

Sir William Jones, *Knt. Attorney General.*

Sir Francis Winnington, *Knt. Solicitor General.*

Brown *againſt* Johnſon.

Caſe 95.

If in *account* a plaintiff declare, that the defendant, from the *firſt of March* to the *firſt of May*, was his receiver, a plea that he was not receiver from the *firſt of March* to the *firſt of May* is bad; for he might have ſaid, that he was not receiver *modo et formâ*; and the time being immaterial ought not to have been made parcel of the iſſue.

10. Mod. 251. 253. 323. Stra. 21. 181. 317. 622. 806. Ld.Ray.85.281. 336. 480. 1126.

ACCOUNT.—The plaintiff declares againſt the defendant, For that upon the firſt of *March* in the twenty-ſecond year of *Charles the Second*, *et abinde* to the firſt of *May* in the twenty-ſeventh year of *Charles the Second*, he was his bailiff, and receiver of eighty pigs of lead.

The defendant pleads, that from the ſaid firſt day of *March* in the twenty-ſecond year of *Charles the Second*, to the firſt day of *May* in the twenty-ſeventh year of *Charles the Second*, he was not the plaintiff's bailiff, or receiver of the ſaid eighty pigs of lead; *et hoc paratus eſt verificare.*

The plaintiff demurred, and aſſigned ſpecially for cauſe, That the times from the *firſt of March* to the *firſt of May* are made parcel of the iſſue; which ought not to be becauſe, the plaintiff in his declaration muſt alledge a time for form ſake; but the defendant ought not to tie him up to ſuch time alledged, for he might have ſaid that he was not bailiff *modo et formâ.*

And for this the caſe of *Lane v. Alexander* (*a*) was cited, where the defendant, by ejectment, makes a title by copy of court roll, granted to him the forty-fourth year of *Elizabeth*, and the plain-

(*a*) Yelv. 122. Cro. Jac. 202. 1. Brownl. 140.

tiff

BROWN *against* JOHNSON.

tiff replies his title by the like grant, on the firſt day of *June* in the forty-third year of *Elizabeth*; the defendant maintains his bar, and traverſeth, that the queen, on the firſt day of *June* in the forty-third year of her reign, granted the ſaid land by copy; and upon demurrer it was adjudged, that the traverſing of the day is matter of ſubſtance, which being made part of the iſſue, is naught.

But on the other ſide it was objected, that the time is material, and that in actions of *account* it is proper to make it parcel of the iſſue; for a man may be bailiff for two, but not for three years, and a releaſe may be pleaded from ſuch a time to ſuch a time, *Fitz.* "*Accompt*," 30. *Raſt. Ent. f.* 8. 19. *pl.* 1. *f.* 20. *pl.* 6. *f.* 22. *pl.* 2.

THE COURT held, that the time ought not to be made parcel of the iſſue.

* [146]

In account as receiver of eighty pigs of lead, a plea that he did not receive them, without ſaying "*or any* "*part thereof*," is bad.

* THEN EXCEPTIONS were taken to the plea.

FIRST, For that the plaintiff having charged the defendant as receiver of eighty pigs of lead, the defendant pleads, "and that "he was not receiver thereof," but doth not ſay "of any part "thereof."—For which reaſon the Court held the plea ill, becauſe he might retain ſeventy-nine, and yet not eighty pigs: but to plead generally *ne unques receptor* is well enough; though it was urged, that if it had been found againſt him upon ſuch an iſſue that he had received any parcel of the lead, he ſhould have accounted. 24. *Hen.* 4. *pl.* 21. 2. *Roll.* 3. 14. 32. *Hen.* 6. *pl.* 33. *Fitz.* "*Accompt*," 16. *Cro. Eliz.* 850. *Fitz.* "*Accompt*," 14. *Raſt. Entry*, 18, 19, 20.

A plea concluding to *the court* inſtead of to *the country*, muſt be ſpecially aſſigned.—Dougl. 60. 94 and ſee 4. Ann. c. 16. ſ. 1.

SECONDLY, The defendant concludes, *et hoc paratus eſt verificare*, whereas it ſhould be, *et de hoc ponit ſe ſuper patriam.*—But THE COURT doubted of this, becauſe it was not ſpecially aſſigned.

Time ſtated *from* ſuch a day excludes the day. Co. Lit. 46. 1. Bulſt. 177. 5. Co. 1. 90. Moor, 40. Cro. Jac. 135. 258. 1. Roll. Rep. 387. 3. Bulſt. 204. Allen, 77. 2. Saund. 317, 318. 3. Lev. 348. 1. Ld. Ray. 84. 480. 2. Ld. Ray. 1241. But ſee the caſe of Pugh *v.* Duke of Leeds, Cowp. 417. to 425. Dougl. 53. note (15). 4. Term Rep. 660. and Powel on Powers, 438 to 533, where all the caſes upon this ſubject are collected.

THIRDLY, The plaintiff charged the defendant as his bailiff *upon* the firſt of *March*, and the defendant pleads that he was not his bailiff *from* the firſt of *March*, ſo he excludes that day.—And this THE COURT held to be incurable.

And ſo judgment was given, *quòd computet.*

Caſe 96. Abraham *againſt* Cunningham.

If adminiſtrator ſell a term, and afterwards an executor appears and renounces, yet the ſale is void.—S. C. 1. Vent. 303. S. C. 2. Lev. 182. S. C. 2. Jones, 72. S. C. 3. Keb. 725. S. C. 1. Freem. 445. S. C. 3. Danv. 350. 6. Co. 18. 4. Inſt. 335. 1. Leon. 90. 135. Moor, 636. Dyer, 160. Hard. 111. Show. 407. 1. Vern. 31. 1. Peer. Wms. 752. 766. 2. Peer. Wms. 308. 3. Peer. Wms. 183. 351. Stra. 412. 716. 1. Salk. 36. 307. 311.

IN A SPECIAL VERDICT IN EJECTMENT, the caſe, upon the pleadings, was thus: *Sir David Cunningham*, being poſſeſſed of a term for years, made his will, and therein appointed his ſon,

Sir David Cunningham, to be his executor, and died. Sir David the executor, in the year 1663, made his will alſo, and therein appointed David Cunningham his ſon and two others to be his executors, and died. Thoſe two executors die, and B. a ſtranger takes out adminiſtration *cum teſtamento annexo*, and continues this adminiſtration from the year 1665 to the year 1671, in which time he made an aſſignment of this term to the leſſor of the plaintiff, for which he had received a thouſand pounds: and in the year 1671 the ſurviving executor of *Sir David* the executor made oath in the archbiſhop's court, that he never heard of his teſtator's will until then, nor ever ſaw it before, and that he had not meddled with the eſtate, nor renounced the executorſhip: then a citation goes to ſhew cauſe why the adminiſtration ſhould not be repealed, and ſentence was given that it ſhould be revoked. Upon which the executor enters, and the leſſor of the plaintiff entered upon him.

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* SAUNDERS, *for the plaintiff*, ſaid, that the authorities in the Books were ſtrong on his ſide, that the firſt adminiſtration was well granted. It is true, if a man make a will, and adminiſtration be granted, and that will be afterwards proved, ſuch adminiſtration is void; as in the caſe of *Greyſbrook v. Foxe*. But in this caſe, after the death of *Sir David Cunningham* the executor's teſtator is dead inteſtate; for to make an executor there muſt be firſt the naming of him; then there muſt be ſome concurring act of his own to declare his aſſent, that he will take *onus executionis* upon him; for no man can make another executor againſt his will: ſo that if after the death of the firſt executor thoſe other executors appointed by him had made ſuch a declaration as this ſurviving executor hath ſince done, their teſtator had died inteſtate. 7. *Edw.* 4. *pl.* 12, 13. The executor is made by the teſtator, and the ordinary is empowered by the ſtatute to make the adminiſtrator where the perſon dies inteſtate; ſo that it is plain, there cannot be an executor and adminiſtrator both together. If he who is made ſo take upon him long after the will to be executor, it ſhall make him ſuch by relation from the time of the death of the teſtator; but here is no executor, nor ever was. It is true, that one was named, but as ſoon as he heard of the will he renounced; and therefore there being no executor in this caſe, nothing now can hinder the adminiſtration to be granted *cum teſtamento annexo*. If the teſtator ſhould die indebted, or have debts owing to him, and the executor refuſe probate, and renounce his executorſhip, adminiſtration muſt be granted; for *lex fingit ubi ſubſiſtit æquitas*; and the executor having a poſſibility to be ſuch, and by his refuſal becoming no executor, why ſhould the bare naming of him to be an executor have relation to make ſuch adminiſtration void? ſince it is not the name, but the doing of the office, which makes him executor. *Dyer*, 372. If all theſe executors had died after adminiſtration thus committed, it cannot be ſaid that they ever were executors. There can be no

* [147]

inconvenience

ABRAHAM against CUNNINGHAM. inconvenience that this administration should be good; for it is just that creditors should have their debts, and purchasors should be secure in the things purchased. If the testator was indebted, an action will lie against an EXECUTOR *de son tort* for such debt, which executor is altogether as wrongful as the administrator to
* [148] whom administration is * committed, and the will afterwards proved by the rightful executor; and if such executor of his own wrong be possessed of a term for years, and a creditor recover against him, that executor shall have the term in satisfaction of his debt; and by the same reason shall the administrator here have a good title to this term which he sold for the payment of a just debt; and there is no authority for making such administration void, unless it be where the executor proves the will, but never when he renounces.

But LEVINZ, *on the other side*, said, that an executor of an executor hath all the interest which the first executor had; so that being an executor the administration granted by the ordinary is void, and the renunciation afterwards shall never make it good; and this will appear by the different interests which the ordinary and the executor have by law.—FIRST, The ordinary originally had nothing to do with the estate of the intestate; for *bona intestati capi solent in manus regis (a).* Afterwards two statutes were made which establish his power; the first was, the statute of *Westminster the First*, *cap.* 19. and the other was 31. *Edw.* 3. c. 11; yet no power was thereby given him to dispose of the goods to his own use, or to the use of any other; he had only a property *secundum quid*, and not an absolute and uncontroulable right, in the estate.—SECONDLY, But the executor hath a right and interest given to him by law when a will is made, and may release before probate (*b*). If he therefore hath an absolute right, and the ordinary hath only a qualified property, how can he grant the administration of the goods, which at the same time are lawfully vested in another? Suppose the executor sell such goods to one man, and the administrator to another, the sale of one of them must be void; and for the said reasons, and by the constant course of the law, it must be the latter (*c*). It hath been objected, that here was no executor at all, only one named; or if it be admitted that there was an executor, yet his refusal shall relate to the time of the administration committed, and make that good which might not be so before. But as to that he said, that here was an executor appointed by the will who had an interest, and administration being granted to another it is void *ab initio*; and what is once void cannot be made good by any subsequent act. 10. *Co.* 62. *a.* (*d*).
[149] * Here was a want of power in him who did this act; for the ordinary could not grant administration where there is an execu-

(*a*) Godolph. 59. 10. Mod. 21. 105. 2. Bac. Abr. 405.

(*b*) 5. Co. Middleton's Case.

(*c*) 2. Anders. 150. case 83. Ld. Ray. 433. 661.

(*d*) 1. Mod. 214. Comyns, 150. 2 Vern. 75. 616. Fitzg. 258. Stra. 911. 917. 1137. Ld. Ray. 520. 685. 661. 1210. 1216.

tor, and therefore no relation ſhall be to make that good which was once *void*; but if it had been only *voidable*, it might have been otherwiſe. A relation may be to enable the party to recover the goods of the inteſtate, and to puniſh treſpaſſes; as if a man die poſſeſſed of goods, and a ſtranger convert them, and afterward adminiſtration is granted to *S.* this adminiſtration ſhall relate to the time of the death of the inteſtate (*a*); ſo that he may maintain trover before the ordinary had committed it to him, but it will never aid the acts of the parties to avoid them by relation: as if a man make a feoffment to a *feme covert*, and afterwards deviſe the ſame land, the huſband diſagrees, this ſhall have relation between the parties, ſo as the huſband ſhall not be charged in damages, but it ſhall not make the void deviſe good. 3. *Co.* 28. b. *Butler v. Baker.* So if a man make a releaſe, and afterwards get letters of adminiſtration, that ſhall not relate to make his releaſe good to bar him, neither ſhall his refuſal of the executorſhip do it, becauſe at the time of the releaſe or the refuſal there was not any right of action in him; for that commences in the one caſe after *adminiſtration*, and in the other after the *probate* of the will. Notwithſtanding ſuch refuſal this executor may afterwards adminiſter at his pleaſure, and intermeddle with the goods of the teſtator; and if the adminiſtration ſhould be good alſo, then they would have a power over the ſame eſtate by two titles at the ſame time, which cannot be. The greateſt argument which can be brought againſt this is *ab inconvenienti*, becauſe it cannot be ſafe to purchaſe under an adminiſtrator, ſince a will may be concealed for a time, and afterwards the lawful executor therein appointed may appear; but this is more proper for the wiſdom of a parliament to redreſs than that the law ſhould be altered by a judicial determination of the Court. He therefore prayed judgment for the defendant.

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Ld. Ray. 520. 3. Peer. Wms. 351.

Godolph. 141.

THE COURT was of opinion, that the ordinary cannot grant adminiſtration where there is an executor named in the will; and therefore gave judgment for the defendant againſt the vendee of this term.

(*a*) 2. Roll. Abr. 399.

HILARY TERM,

The Twenty-Eighth and Twenty-Ninth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*

Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.* } *Justices.*
Sir William Scroggs, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

* Lord Townsend *against* Dr. Hughes. Case 97.

The Court will not grant a *new trial* in an action of *scandalum magnatum* on account of excess in damages.

S.C. 1. Mod. 232. S.C. 1. Freem. 217. 220. 222. Comb. 357. Comyns, 252. Gilb. Eq. Rep. 209. 8. Mod. 26. 1. Stra. 101. 422. 2. Stra. 814. 899. 1102. 1238. Ld. Ray. 727. 831. Cowp. 37. 230. 2. Wilf. 205. 2. Bl. Rep 1327. 3. Burr. 1846. 1. Burr. 394. 4. Ter. Rep. 652.

THE PLAINTIFF brought an action of *scandalum magnatum* for these words spoken of him by the defendant, *viz.* "He "is an unworthy man, and acts against law and reason." Upon *not guilty* pleaded, the case was tried, and the jury gave the plaintiff four thousand pounds damages.

The defendant before the trial made all possible submission to my lord; he denied the speaking the words; and made oath that he never spoke the same; after the trial he likewise addressed my lord as before, making several protestations of his innocency: but having once in a passion said, that he scorned to submit; my lord, for that reason, would not remit the damages. It was therefore moved for a new trial upon these reasons:

FIRST, Because the witnesses, who proved the words, were not persons of credit, and that at the time when they were alledged to be spoken, many clergymen were in company with the defendant, and heard no such words spoken.

SECONDLY, It was sworn, that one of the jury confessed, that they gave such great damages to the plaintiff (not that he was

 damnified

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damnified so much) but that he might have the greater opportunity to shew himself noble in the remitting of them.

THIRDLY, and which was the principal reason, Because the damages were excessive.

THE COURT delivered their opinions *seriatim.* And first,

NORTH, *Chief Justice*, said, In cases of *fines* for criminal matters, a man is to be fined by MAGNA CHARTA with a *salvo contenemento suo*; and no fine is to be imposed greater than he is able to pay; but in *civil actions* the plaintiff is to recover by way of compensation for the damages he hath sustained, and the jury are the proper judges thereof. This is *a civil action* brought by the plaintiff for words spoken of him, which if they are in their own nature actionable, the jury ought to consider the damage which the party may sustain; but if a particular averment of special damages make them actionable, then the jury are only to consider such damages as are already sustained, and not such as may happen in future, because for such the plaintiff may have a new action. He said, that as a Judge he could not tell what value to set upon
[151] the * honour of the plaintiff; the jury have given four thousand pounds, and therefore he could neither lessen the sum or grant a new trial, especially since by the law the jury are judges of the damages: and it would be very inconvenient to examine upon what account they gave their verdict; they, having found the defendant guilty, did believe the witnesses, and he could not now make a doubt of their credibility.

WYNDHAM, *Justice*, accorded *in omnibus.*

* But see an Anonymous Case, 1. Mod. 2. and the cases there cited.

ATKINS, *Justice*, *contra.* That a new trial should be granted, for it is every day's practice; and he remembered the case of *Gouldston v. Wood* in the king's bench, where the plaintiff in an action on the case for words for calling of him *bankrupt*, recovered fifteen hundred pounds, and that Court granted a new trial, because the damages were *excessive.* The jury in this case ought to have respect only to the damage which the plaintiff sustained, and not to do an unaccountable thing that he might have an opportunity to shew himself generous; and as the Court ought with one eye to look upon the verdict, so with the other they ought to take notice what is contained in the declaration, and then to consider whether the words and damages bear any proportion; if not, then the Court ought to lay their hands upon the verdict: it is true, they cannot lessen the damages, but if they are too great the Court may grant a new trial.

SCROGGS, *Justice*, accorded with NORTH and WYNDHAM, that no new trial can be granted in this cause. He said, that he was of counsel with the plaintiff before he was called to the bench, and might therefore be supposed to give judgment in favour of his former client, being prepossessed in the cause, or else (to shew himself more signally just) might without considering the matter

give

give judgment against him; but that now he had forgot all former relation thereunto; and therefore delivered his opinion, that if he had been of the jury he should not have given such a verdict; and if he had been plaintiff he would not take advantage of it; but would overcome with forgiveness such follies and indiscretions of which the defendant had been guilty: but that he did not sit there to give advice, but to do justice to the people. He did agree that where an unequal trial was (as such must be where there is any practice with the jury), in such case it is good reason to grant a new trial; but no such thing appearing to him in this case, a new trial could not be granted. * Suppose the jury had given a scandalous verdict for the plaintiff, as a penny damages, he could not have obtained a new trial in hopes to increase them, neither shall the defendant in hopes to lessen them. And therefore by the opinion of these three Justices a new trial was not granted.

See Cowp. 230.

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MAYNARD, *Serjeant*, afterwards in this Term moved in arrest of judgment, and said, that this action was grounded upon the statute of 2. *Rich.* 2. *st.* 1. *s.* 5. which consists of *a preamble* reciting the mischief, and of the enacting part in giving of a remedy, and that the defendant's case was neither within the mischief or the remedy. This statute doth not create any action by way of particular design, and if the matter was now *res integra*, much might be said that an action for damages will not lie upon this statute; for the statute of *Westminster the Second* appoints that the offender shall suffer imprisonment until he produce the author of a false report; and the statute of 2. *Rich.* 2. st. 1. which recites that of *Westminster the Second*, gives the same punishment, and the action is brought *qui tam*, &c. and yet the plaintiff only recovers for himself. It was usual to punish offenders in this kind in THE STAR CHAMBER; as in the *Earl of Northampton's Case (a)*, where one *Goodrick* said of him, "He wrote a book against *Garnet*, and a "letter to *Bellarmine*;" intimating, that what he wrote in the book was not his opinion, but only *ad captandum populum*, which was a great disgrace to him in those days, being as much as to say, he was *a papist*. But THE SERJEANT would not insist upon that now, since it hath been ruled, that where a statute prohibits the doing of a thing which if done might be prejudicial to another, in such case he may have an action upon that very statute for his damages. But the ground on which he argued was, that these words, as spoken, are not within the meaning of the act, for they are not actionable;

To say of a peer of the realm, "He is an unworthy man, "and acts "against law "and reason," is actionable by the statute 2. *Rich.* 2. st. 1. c. 5. *de scandalis magnatum.* S. C. 1. Mod. 233. 4. Co. 13. 1. Roll. Rep. 78. Vidian's Ent. 72. Cro. Car. 136. Ley, 82. Palm. 562. 12. Co. 134. 1. Lev. 148. 27. 1. Sid. 434 1. Vent. 60. 1. Mod. 233. 3 Bulst. 226. Cro. Eliz. 1. 68. 1. Leon. 336. 1. And. 121. Cro. Jac. 196. 2. Inst. 228. Dyer, 285. Poph. 67. 4. Bac. Abr. 406.

FIRST, Because they are no scandal; and words which are actionable must import a great scandal, which no circumstance or occasion of speaking can excuse; and if they be scandalous, and capable of any mitigation by the precedent discourse, the pleading of that matter will make them not actionable: and for this the *Lord Cromwell's Case (b)* is a plain authority; the words spoken

(a) 12. Co. 132.

(b) 4. Co. 13. b.

of

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of him were, "You like thofe that maintain fedition againft the "king's perfon;" the occafion of fpeaking of which was to give an account of his favouring the puritan preachers, which was all that was intended by the former difcourfe; for that lord had ap-
*[153] proved a fermon which was preached * by a parfon againft the *Common Prayer Book*, and the defendant having forbid fuch preaching, the lord told him that he did not like him, upon which he fpoke thofe words; fo that the fubject-matter explained the fenfe, for which reafon it was adjudged that the action would not lie.

SECONDLY, The fcandal for which an action may be brought within this ftatute muft be falfe; for that word goes quite through the whole act, *viz.* "falfe news, falfe lies, &c." And the words here are fo general, that it cannot appear whether they are true or falfe, for there can be no juftification here, as in cafe where a man is charged with a particular crime; my *Lord Townfend* is not charged with any particular act of injuftice as a fubject, nor with any mifdemeanour as a peer, nor with any offence in an office. If therefore in all actions brought upon this ftatute, the defendant may juftify, and put the matter in iffue to try whether it be true or falfe, and in this cafe the defendant can neither juftify nor traverfe, the action for this reafon will not lie.

THIRDLY, That the words are general and of a doubtful fignification, it cannot be denied; for to fay "he is an unworthy "man" imports no particular crime. "Unworthy" is a term of relation, as he is unworthy of my friendfhip, acquaintance, or kindred, and fo may be applicable to any-thing; and a lord may in many things be unworthy of a particular man's friendfhip; as if he promife to pay a fum of money at a day certain, and fail in the payment (as it is often feen), fuch is an unworthy man, but that will not bear an action: he is an unworthy man who invites another to dinner to affront him; but it will not bear an action to fay, that "a lord invited me to a dinner to abufe me;" neither will it be actionable to fay, he is an unworthy man, becaufe fuch inftances may be given of his unworthinefs which will not bear an action. If my lord had been compared to any bafe and unworthy thing, thefe words might have been actionable; and that was the cafe of the *Lord Marquis of Dorchefter*, it being faid of him, that "there was no more value in him than in a dog." Then to fay, "A man acts againft law," this is no fcandal, becaufe every man who breaks a penal law, and fuffers the penalty, is not guilty of any crime. The ftatute commands the burying in woollen, the party buries one of his family in linen; in this he acts againft the law, but if the penalty is fatisfied, the law is fo likewife. A man who acts againft law acts againft reafon, becaufe *lex eft fumma ratio*; but no inftance is here given wherein he did thus act: it is not faid that he did act againft law wilfully,
*[154] or that * he ufed to do any-thing againft law; and fo cannot be like the cafe of the *Duke of Buckingham*, who brought an action for thefe words, *viz.* "You are ufed to do things againft law, and "put

"put cattle into a castle where they cannot be replevied;" for there was not only an usage charged upon him, but a particular instance of oppression. This action lies for words spoken of a Judge of either bench, and of a bishop, as well as of a peer. Now if a man should say, "A Judge acted against law," will an action lie? because a Judge may do a thing against law, and yet very justly and honestly, unless all the Judges were infallible, and could not be subject to any mistakes, which none will deny. So if a bishop return the cause of his refusal to admit a clerk *quia criminosus*, this is a return against law, because it is too general; but if *J. S.* should say, "A bishop acted against "law," and shew that for cause, an action would not lie. If *Lord Townsend* had commanded his bailiff to make a distress without cause, that had been acting against law and reason. He agreed the words to be uncivil, but not actionable; for if such construction should be made, a man must talk in print, or otherwise not speak any-thing of a peer for fear of an action. There are many authorities where a peer shall not have an action for every trivial and slight expression spoken of him. As to say of a peer, "He "keeps none but rogues and rascals about him like himself;" by the opinion of two Justices, YELVERTON and FLEMMING, the action would not lie, because they are words of scolding; and this was the case of the *Earl of Lincoln*, *Cro. Jac.* 196. but the Court was divided; the defendant died, and so the writ abated. Actions for words have been of late too much extended; formerly there were not above two or three brought in many years; and if this statute should be much enlarged, the lords themselves will be prejudiced thereby by maintaining actions one against another. Upon this statute of 2. *Rich.* 2. c. 5. there was no action brought till 13. *Hen.* 7. which was above an hundred years after the making of that law; and the occasion of making the law was, because the *Duke of Lancaster*, who was then the first prince of the blood, took notice that divers were so hardy as to speak of him several lying words, 1. *Rich.* 2. *num.* 56. and therefore this statute was made to punish those who devised "false news, and horrible and "false lies of any peer, &c. whereby discords might arise between "the lords and commons, and great peril and * mischief to the "realm, and quick subversion thereof." Now from the natural intent and construction of these words in the act, can it be supposed that if one should say, "such a peer is an unworthy man," that the kingdom would be presently in a flame and turned into a state of confusion and civil war? and to say, "that he acts against "law," that the government would thereby be in danger to be lost, and quick subversion would follow? This cannot be the common and ordinary understanding of these words. If therefore the plaintiff by speaking these words was in no hazard, nor any wise damnified; if he was not touched in his loyalty as a peer, nor in danger of his life as a subject; if he was not thereby subjected to any corporal or pecuniary punishment, nor charged with any breach of oath, nor with a particular miscarriage in any office; if

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the words are so general that they import no scandal, and are neither capable of any justification; and lastly, if they are not such horrible lies as are intended to be punished by the statute; he concluded for these reasons the action would not lie, and therefore prayed that the judgment might be arrested.

BALDWIN and BARRel, *Serjeants*, argued on the same side *for the defendant*; but nothing was mentioned by them which is not fully insisted on in the argument of MAYNARD, *Serjeant*, for which reason I have not reported their arguments.

But PEMBERTON, *Serjeant*, who argued *for the plaintiff*, said, that it would conduce much to the understanding of the statute of 2. *Rich.* 2. c. 5. upon which this action of *scandalum magnatum* was grounded, to consider the occasion of the making of it. In those days *the English* were quite of another nature and genius from what they are at this time; the constitution of this kingdom was then martial, and given to arms; the very tenures were military, and so were the services, as knights service, castleguard, and escuage. There were many castles of defence in those days in the hands of private men; their sports and pastimes were such as tilts and tournaments; and all their employments were tending to breed them up in chivalry. Those who had any dependency upon noblemen were enured to bows and arrows, and to signalize themselves in valour it was the only way to riches and honour. Arts and sciences had not got such ground in the kingdom as now; but the commons had almost their dependence upon the lords, whose power
* [156] then was exceeding great, and their practices were conformable * to their power; and this is the true reason why so few actions were formerly brought for scandals, because when a man was injured by words, he carved out his own remedy by his sword. There are many statutes made against riding privately armed, which men used in those days to repair themselves of any injury done unto them; for they had immediately recourse to their arms for that purpose, and seldom or never used to bring any actions for damages. This was their revenge; and having thus made themselves judges in their own cases, it was reasonable that they should do themselves justice with their own weapons: but this revenge did not usually end in private quarrels; they took parties, engaged their friends, their tenants and servants on their sides, and by such means made great factions in the commonwealth; by reason whereof the whole kingdom was often in a flame, and the government as often in danger of being subverted; so that laws were then made against wearing liveries or badges, and against riding armed.
4. Bac Abr. 40;. This was the mischief of those times, to prevent which this statute of 7. *Rich.* 2. c. 13 was made; and therefore all provoking and vilifying words, which were used before to exasperate the peers, and to
See 1. Hawk. P. C. 166. make them betake themselves to arms, by the intent of this act are clearly forbidden, which was made chiefly to prevent such consequences; for it was to no purpose to make a law, and thereto give a peer an action for such words as a common person might

might have before the making of the ftatute, and for which the peer himfelf had a remedy alfo at the common law, and therefore needed not the help of this act. If then the defign of this ftatute was to hinder fuch practices as aforefaid, the next thing to be confidered is, what was ufual in thofe days to raife the paffions of peers to that degree; and that will appear to be, not only fuch things as imported a great fcandal in themfelves, or fuch for which an action lay at the common law, but even fuch things as favoured of any contempt of their perfons, and fuch as brought them into difgrace with the commons, for hereby they took occafion of provocation and revenge. It is true, that very few actions were brought upon this ftatute in fome confiderable time after it was made; for though fuch practices were thereby prohibited, the lords did not prefently apply themfelves to the remedy therein given, but continued the military way of revenge to which they had been accuftomed. * As to THE FIRST OBJECTION that hath been made, he gave no anfwer to it, becaufe it was not much infifted upon on the other fide, whether an action would lie upon this ftatute; for the very words of it are fufficient ground for an action; and it is very well known, that where-ever an act prohibits an evil thing, the perfon againft whom fuch thing is done may maintain an action. This ftatute confifts of two parts. The firft is prohibitory, *viz.* "that no man fhall do fo, &c." Then comes the additional claufe, and faith, "that if he do, he fhall incur fuch penalty." It is on the firft part that this action is grounded; and fo it was in the *Earl of Northampton's Cafe*, in that Report which goes under the name of the *Lord Coke's Twelfth Report*, where by the refolution of all the Judges in *England*, except FLEMING who was abfent, it was adjudged, that it was not neceffary that any particular crime fhould be fixed on the plaintiff, or any offence for which he might be indicted. So are the authorities in all the cafes relating to this action: in the *Lord Cromwell's Cafe* (*a*) for thefe words, "You like thofe who maintain fedition:" in the *Lord of Lincoln's Cafe*, "My lord is a bafe earl, and a paltry "lord, and keepeth none but rogues and rafcals like himfelf:" in the *Duke of Buckingham's Cafe*, "He has no more confcience "than a dog:" in the *Lord Marquis of Dorchefter's Cafe* (*b*), "He is no more to be valued than the black dog which lies there:" all which words were held actionable, and yet they touch not the perfons in any-thing concerning the government, or charge them with any crime but in point of dignity or honour; and they were all vilifying words, and might give occafion of revenge. And fo are the words for which this action is brought; they are rude, uncivil, and ill-natured. "Unworthy" is as much as to fay bafe and ignoble, a contemptible perfon, and a man of neither honour nor merit. And thus to fpeak of a nobleman is a reflection upon the king, who is the fountain of honour, that gives it to fuch perfons who are (in his judgment) deferving, by which they are

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Vide ante.

(*a*) 4. Co. 13. b. Cro. Jac. 196.
(*b*) Hilary Term, 16. *Car.* 2. Roll 1269. affirmed on a writ of error to the king's bench.

made

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made capable of advising him in parliament; and it would be very dishonourable to call unworthy men thither. It is likewise a dishonour to the nobility to have such a person to sit among them as a companion, and to the commons to have their proceedings in parliament transmitted to such peers: so that it tends to the dishonour of all dignities, both of king, lords, and commons, and thereby discords may arise between the two houses, which is the
* [158] mischief intended to be remedied by this act. * Then the following words are as scandalous; for to say "a man acts against "law and reason" imports several such acts done. A man is not denominated to be unworthy by doing of one single act; for in these words more is implied than to say, "he hath done an un-"worthy thing;" for the words seem to relate to the office which the plaintiff had in the country, as lord lieutenant, which is an office of great honour; and can any-thing tend to cause more discord and disturbance in the kingdom than to say of a great officer, that "he acts according to the dictates of his will and "pleasure?" the consequence of which is, that he will be rather scorned than obeyed. It hath been objected, that the words are general, and charge him not with any act. But the scandal is the greater; for it is not so bad to say, "a man did such a particular "thing against law and reason," as to say, "he acts against law," which is as much as to say, his constant course and practice is such: and to say that the words might be meant of breaking a penal law, that is a foreign construction; for the plain sense is, he acts against the known laws of the kingdom, and his practice and designs are so to do, for he will be guided neither by law nor reason. It is also objected, that the scandal must be false: but whether true or not there can be no justification here, because they are so general that they cannot be put in issue. We answer, He agreed that no action would lie upon this statute if the words were true; but in some cases the divulging of a scandal was an offence at the common law. Now to argue (as on the other side), that the defendant cannot justify, and therefore an action will not lie, is a false consequence; because words may be scandalous and derogatory to the dignity of a peer, and yet the subject-matter may not be put in issue. He agreed also, that occasional circumstances may extenuate and excuse the words, though ill in themselves; but this cannot be applied to the case in question, because the words were not mitigated. The defendant pleaded *not guilty*, and insisted on his innocence; the jury have found him *guilty*, which is an aggravation of his crime: if he would have extenuated them by any occasion upon which they were spoken, he should have pleaded it specially or offered it in evidence, neither of which was done. This act is to be taken favourably for him against whom the words are spoken, because it is to prevent great mischiefs which may fall out in the kingdom by rude and uncivil discourses; and in such cases it is usual for courts rather to
[159] * enlarge the remedy than to admit of any extenuation. For these reasons he prayed that the plaintiff might have his judgment.

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It was argued by CALTHROP, *Serjeant, on the same side*, and to the same effect.

Afterwards this Term ALL THE JUDGES argued this case *seriatim* at the bench. And first,

SCROGGS, *Justice*, said, That the greatness of the damages given should not prevail with him, either on the one side or the other. At the common law no action would lie for such words, though spoken of a peer, for such actions were not formerly much countenanced; but now since a remedy is given by the statute, words should not be construed either in a rigid or mild sense, but according to the genuine and natural meaning, and agreeable to the common understanding of all men. At the bar the strained sense of the plaintiff is, that these words import "he is no man "of honour;" and for the defendant, that they import no scandal; and that no more was meant by them but what may be said of every man. It is true, in respect of God Almighty we are all unworthy, but the subsequent clause explains what unworthiness the defendant intended, for he infers him to be unworthy because he acts against law and reason. Now whether the words thus explained fix any crime on the plaintiff, is next to be considered; and he was of opinion that they did fix a crime upon him; for to say, "He is an unworthy man," is as much as to say, "He is a "vicious person," and is the same as to call him a corrupt man, which in the case of a peer is actionable; for general words are sufficient to support such an action, though not for a common person. To say "a man acts against law and reason," is no crime, if he do it ignorantly; and therefore if he had said, "My "lord was a weak man, for he acts against law and reason," such words had not been actionable; but these words as spoken do not relate to his understanding, but to his morals; they relate to him also as a peer, though the contrary has been objected, that they relate to him only as a man, which is too nice a distinction; for to distinguish between a man and his peerage, is like the distinction between the person of the king and his authority, which hath been often exploded; the words affect him in all qualities and all relations. It has been also objected, that the words are too general, and like the case of the bishop's return that a man is * *criminosus*, which is not good: but though they are general * [160] in the case of a peer, they are actionable; for to say of a bishop that "he is a wicked man," these are as general words, and yet an action will lie. It has been also objected, that general words cannot be justified; but he was of another opinion; as if the plaintiff, who was lord lieutenant of the county, had laid an unequal charge upon a man, who, upon complaint made to him, ordered such charge to stand, and that his will in such case should be a law; if the person should thereupon say, that "the lord had "done unworthily, and both against law and reason;" those words might have been justified, by shewing the special matter, either in pleading or evidence. It is too late now to examine whether

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an action will lie upon this statute; that must be taken for granted, and therefore was not much insisted on by those who argued for the defendant; for the authorities are very plain, that such actions have been allowed upon this statute. The words, as here laid to be spoken, are not so bad as the defendant might speak, but they are so bad that an action will lie for them; and though they are general, yet many cases might be put of general words which import a crime, and were adjudged actionable. The *Earl of Leicester's Case*, "He is an oppressor:" the *Lord Winchester's Case*, "He kept me in prison till I gave him a release:" these words were held actionable, because the plain inference from them is, that they were oppressors. The *Lord Abergavenny's Case*, "He "sent for me and put me into *Little Ease*;" it might be presumed, that that lord was a justice of peace, as most peers are in their counties, and that what he did was by colour of his authority. So are all the cases cited by those who argued for the plaintiff, in some of which the words were strained to import a crime, and yet adjudged actionable; especially in the case of the *Lord Marquis of Dorchester*, "He is to be valued no more than a dog," which are less slanderous words than those at the bar, because the slander is more direct and positive. It appears by all these cases, that the Judges have always construed in favour of these actions; and this has been done, in all probability, to prevent those dangers that otherwise might ensue if the lords should take revenge themselves. For these reasons he held the action will lie.

[161] * ATKINS, *Justice*, *contra*. This is not a common action upon the case, but an action founded upon the statute of the 2. *Rich.* 2. upon the construction whereof the resolution of this case will depend, whether the action will lie or not. And as to that he considered,—FIRST, The occasion.—SECONDLY, The scope.—THIRDLY, The parts of the statute.—FIRST, The occasion of it is mentioned in *Cotton's Abridgment of the Records of the Tower* (*a*). At the summoning of this parliament, the *Bishop of St. David's* declared the causes of their meeting, and told both the houses of the mischiefs that had happened by divers slanderous persons, and sowers of discord, which he said were dogs that eat raw flesh; the meaning of which was, that they devoured and eat one another; to prevent which the bishop desired a remedy, and his request seemed to be the occasion of making this law; for *ex malis moribus bonæ nascuntur leges.*—SECONDLY, The scope of the act was to restrain unruly tongues from raising false reports, and telling stories and lies of the peers and great officers of the kingdom; so that the design of the act was to prevent those imminent dangers which might arise and be occasioned by such false slanders.—THIRDLY, Then the parts of the act are three, *viz.* reciting the offence and the mischief, then mentioning the ill effects, and appointing of a penalty. From whence he observed,—FIRST, That here was no new offence made or declared; for nothing was pro-

4. Bac. Abr. 406.

(*a*) Cotton, folio 173. number 9. & 10.

hibited

hibited by this ſtatute, but what was ſo at the common law before. The offences to be puniſhed by this act are *mala in ſe*, and thoſe are offences againſt the moral law; they muſt be ſuch in their nature, as bearing of falſe witneſs; and theſe are offences againſt a common perſon, which he admitted to be aggravated by the eminency of the perſon againſt whom they were ſpoke: but every uncivil word, or rude expreſſion, ſpoken even of a great man, will not bear an action; and therefore an action will not lie upon this ſtatute for every falſe lie, but it muſt be *horrible* as well as *falſe*, and ſuch as were puniſhable in the high commiſſion court, which were enormous crimes, 12. *Co.* 43. By this deſcription of the offences, and the conſequences and effects thereof, he ſaid he could better judge whether the * words were actionable or not; and he was of opinion, that the ſtatute did not extend to words of a ſmall and trivial nature, nor to all words which were actionable, but only to ſuch which were of a greater magnitude, ſuch by which diſcord might ariſe between the lords and commons, to the great peril of the realm, and ſuch which were great ſlanders, and horrible lies; which are words purpoſely put into this ſtatute, for the aggravation and diſtinction of the crime; and therefore ſuch words which are actionable at the common law may not be ſo within this ſtatute, becauſe not horrible great ſcandals. He did not deny but that theſe were indecent and uncivil words, and very ill applied to that honourable perſon of whom they were ſpoken, but nobody could think that they were horrible great ſlanders, or that any debate might ariſe between the lords and commons by reaſon ſuch words were ſpoken of this peer, or that it ſhould tend to the great peril of the kingdom and the quick deſtruction thereof. Such as theſe were not likely to be the effects and conſequences of theſe words, and therefore could not be within the meaning of the act, becauſe they do not agree with the deſcription given in it.— SECONDLY, Here is no new puniſhment inflicted on the offender; for at the common law any perſon for ſuch offences as herein are deſcribed might have been fined and impriſoned, either upon indictment or information brought againſt him; and no other puniſhment is given here but impriſonment. Even at the common law ſcandal of a peer might be puniſhed by pillory and loſs of ears. 5. *Co*, 125. *de libellis famoſis*. 12. *Co*. 37. 9. *Co*. 59. *Lamb's Caſe*. So that it appears this was an offence at the common law, but aggravated now becauſe againſt an act of parliament, which is a poſitive law, much like a proclamation which is ſet forth to enforce the execution of a law, by which the offence is afterwards greater. He did agree, that an action would lie upon this ſtatute, though there were no expreſs words to give it to a peer; becauſe where there is a prohibition, and a wrong and damage ariſes to the party by doing the thing prohibited, in ſuch caſe the common law doth intitle the party to an action. 10. *Co*. 75. 12. *Co*. 100. 103. And ſuch was the reſolution in the *Earl of Northampton's Caſe*, upon conſtruction of the law as incident to the ſtatute; and as the offence is greater becauſe of the act, and as the action will

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will lie upon the ſtatute, ſo the party injured may ſue in a *qui tam*, which he could not have done before the making this law.—THIRDLY, * But that ſuch words as theſe were not actionable at the common law, much leſs by the ſtatute; for the defendant

*[163] ſpoke only his judgment and opinion, and doth not directly charge the plaintiff with any-thing; and might well be reſembled to ſuch caſes as are in 1. *Roll. Abr.* 57. *pl.* 30. which is a little more ſolemn, becauſe adjudged upon a ſpecial verdict: the words were ſpoken of a juſtice of peace, "Thou art a blood-ſucker, and not "fit to live in a commonwealth." Theſe were held not actionable, becauſe they neither relate to his office, nor fix any crime upon him. *Fol.* 43. in the ſame book, "Thou deſerveſt to be hanged," not actionable, becauſe it was only his opinion. So where the words are general, without any particular circumſtances, they make no impreſſion and gain no credit; and therefore in 1. *Roll. Abr.* 107. *pl.* 43. "You are no true ſubject to the king," the action would not lie (*a*). In this caſe it is ſaid, the plaintiff "acts againſt law," which doth not imply a habit in him ſo to do; and when words may as well be taken in a mild as in a ſevere ſenſe, the rule is, *quòd in mitiori ſenſu accipienda ſunt.* Now theſe words are capable of ſuch a favourable conſtruction; for no more was ſaid of the plaintiff than what in ſome ſenſe may be ſaid of every perſon whatſoever; for, Who can boaſt of his innocency? Who keeps cloſe in all his actions to law and reaſon? and to ſay "a man acts againſt both" may imply, that he departed from thoſe rules in ſome particular caſes, where it was the error of his judgment only. In the *Duke of Buckingham's Caſe* (*b*), "You are uſed to do things againſt law," and mentions a particular fact; there indeed, becauſe of *uſage* of the ill practice, it was held that an action lies; but if he had been charged for doing a thing againſt law but once, an action would not lie.

He then obſerved how the caſes which have been adjudged upon this ſtatute agree with the rules he had inſiſted on in his argument, which caſes have not been many, and thoſe too of late times in reſpect of the antiquity of the act, which was made almoſt three hundred years ſince, *viz.* in the year 1379; and for one hundred and twenty years after no action was brought: the firſt that is reported was 13. *Hen.* 7. *Keilway*, 26.: ſo that we have no *contemporanea expoſitio* of the ſtatute to guide an opinion, which would be a great help in this caſe, becauſe they who make an act beſt underſtand the meaning; but now the meaning muſt

*[164] be * collected from the ſtatute itſelf, which is the beſt expoſition, as the rule is given in *Bonham's Caſe* (*c*).

The next in time is the *Duke of Buckingham's Caſe* (*d*), "You have no more conſcience than a dog:" and in the ſame

(*a*) See alſo Eaton *v.* Ayloff, Cro. Car. 111.

(*b*) 1. Shep. Abr. 28.

(*c*) 8. Co. 13. *Hen.* 7.

(*d*) 4. *Hen.* 8. Crompton's Juriſdiction of Courts, page 13.

book

book (a), "You care not how you come by goods:" in both which cases the words charge the plaintiff with particular matter, and give a narrative of something of a false story, and do not barely rest upon an opinion. In the case of the *Bishop of Norwich* (b), these words, "You have writ to me that which is "against the word of God, and to the maintenance of superstition," were held actionable, because they refer to his function and greatly defame him, and yet he had but five hundred marks damages. In the case of *Lord Mordant v. Bridges* (c), "My *Lord* "*Mordant* did know that *Prude* robbed *Shotbolt*, and bid me "compound with *Shotbolt* for the same, and said he would see "me satisfied for the same, though it cost him an hundred pounds; "which I did for him being my master, otherwise the evidence "I could have given would have hanged *Prude*;" these words were held actionable, and one thousand pounds damages given: and in all the other cases which have been mentioned upon this statute, and where judgment was given for the plaintiff, the words always charge him with some particular fact, and are positive and certain; but where they are doubtful and general, and signify only the opinion of the defendant, they are not actionable. The words in the case at bar neither relate to the plaintiff as a peer or a lord lieutenant, and charge him with no particular crime; so that from the authority of all these cases he grounded his opinion, that the action would not lie: and he said, if laws should be expounded to rack people for words, instead of remedying one mischief many would be introduced, for in such case they would be made snares for men. The law doth bear with the infirmities of men, as religion, honour, and virtue doth in other cases; and amongst all the excellent qualities which adorn the nobility of this nation, none doth so much as forgiving of injuries. SOLOMON saith, that "it is the honour of a man to pass by an "infirmity;" which if the plaintiff should refuse, yet the defendant (if he thinks the damages excessive) is not without his remedy by attaint; for he said, he could shew where an attaint was brought against a jury for giving sixty pounds damages. * He farther said, that he could not find that any judgment had been either reversed or arrested upon this statute, and therefore it was fit that the law should be settled by some rule, because it is a wretched condition for people to live under such circumstances as not to know how to demean themselves towards a peer: and since no limits have been hitherto prescribed, it is fit there should be some now; and that the Court should go by the same rules in the case of a peer as in that of a common person, that is, not to construe the words actionable without some particular crime charged upon the plaintiff, or unless he alledge special damages. For these reasons he held that this action would not lie. * [165]

(a) Lord Abergavenny v Cartwright.

(b) Cro. Eliz. 1.

(c) Cro. Eliz. 67.

WYNDHAM,

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WYNDHAM, *Justice*, accorded with SCROGGS; and NORTH, *Chief Justice*, agreed with them in the same opinion. His argument was thus: FIRST, He said, that he did not wonder that the defendant made his case so solemn, being loaded with so great damages; but that his opinion should not be guided with that or with any rules but those of law, because this did not concern the plaintiff alone, but was the case of all the nobility of *England*; but let it be never so general, and the conveniences or inconveniences never so great, he would not upon any such considerations alter the law. He said, that no action would lie upon this statute which would not lie at the common law; for where a statute prohibits a thing generally, and no particular man is concerned, an offence against such a law is punishable by indictment; but where there is a particular damage to any person by doing the thing prohibited, there an action will lie upon the statute, and so it will at the common law: the words therefore which are actionable upon this statute are so at the common law. This statute extends only to peers or other great officers: now every peer, as such, is a great officer; he has an office of great dignity; he is to support the king by his advice, of which he is made capable by the great eminency of his reputation; and therefore all words which reflect upon him as he is the king's counsellor, or as he is a man of honour and dignity, are actionable at the common law. In the ordinary cases of officers, it is not necessary to say that the words were spoken relating to his office; as to say of a lawyer that "he is a sot," or "an ignoramus;" or of a tradesman,
[166] "he is a * bankrupt," the action lies, though the words were not spoken of either as a lawyer or a tradesman. He did not think that Judges were to teach men by what rules to walk other than what did relate to the particular matter before them, all other things are *gratis dicta*; neither would he allow that distinction, that an action would not lie where a man spoke only his opinion; for if that should be admitted, it would be very easy to scandalize any man; as "I think such a Judge is corrupt," or "I am of "opinion that such a privy councillor is a traitor;" and can any man doubt whether these or such like words are actionable or not, because spoken only in the sense of the person? It is true, in some cases, where a man speaks his own particular disesteem, an action will not lie; as if I say, "I care not for such a lord;" but that differs much where a man speaks his opinion with reference to a crime; for opinions will be spread, and will have an implicit faith, and because one man believes it another will; and it is upon this ground that all the cases which have been since the statute are justified; and so was the late case of* the *Marquis of Dorchester (a)*, "He is no more to be valued than the black dog which lies there," which were words of disesteem, and only the opinion of the defendant; in which case judgment was affirmed in a writ of error.

(a) 1. Sid. 233.

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IF IT BE OBJECTED, to what purpose this statute was made, if no action lies upon it but what lay at the common law; I ANSWER, the plaintiff now, upon the statute, must prosecute *tam pro domino rege quàm pro seipso*, which he could not do at the common law. And it has been held in the star-chamber, that if a *scandalum magnatum* be brought upon this statute the defendant cannot justify, because it is brought *qui tam*, *&c.* and the king is concerned; but the defendant may explain the words, and tell the occasion of speaking of them: if they are true they must not be published, because the statute was to prevent discords.

In an action of *scan. mag.* the defendant cannot justify.

Freem. 221. Poph. 67. Ld. Ray. 879. 4. Bac. Abr. 408.

IT IS OBJECTED, that these words carry in them no disesteem. I answer, that according to a common understanding they are words of disrespect and of great disesteem; for it is as much as to say, that the plaintiff is a man of no honour; that he is one who lives after his own will, and so is not fit to be employed under the king. If any precedent discourse had qualified the speaking these words, it ought to have been shewn by the defendant, which is not done. And therefore he concluded that the words, * notwithstanding what was objected, were actionable. * [167]

And so by the opinion of him, WYNDHAM and SCROGGS, *Justices*, judgment was given for the plaintiff.

ATKINS, *Justice*, of a contrary opinion.

Anonymous.

Case 98.

AN ACTION OF ASSAULT, BATTERY, WOUNDING, AND FALSE IMPRISONMENT FOR AN HOUR, was brought against the defendant, who pleads *quoad venire vi et armis* not guilty; and as to the *imprisonment*, he justified as servant to THE SHERIFF, attending upon him at the time of THE ASSIZE, from whom he received a command to bring the plaintiff (being another of the sheriff's servants) from the conventicle; where finding of him, he *(to wit* the defendant) did *molliter manus imponere* upon the plaintiff, and brought him before his master, *quæ est eadem transgressio*. To this the plaintiff demurred,

A servant may justify the bringing of his fellow-servant *vi et armis* from a conventicle, or an alehouse, by the command of his master.

Cro. Jac. 360. Stra. 953. Ld. Ray. 62. 310. 1. Bl. Com. 416. 3. Bac. Abr. 567.

FIRST, Because the substance of the justification is not good; for the servant could not thus justify, though his master might; for the lord may beat his villein without a cause, but if he command another to do it, an action of battery lies against him, 2. *Hen.* 4. *pl.* 4.

SECONDLY, But though this might have been good, if well pleaded, yet it is not good as pleaded here; for the defendant saith *quoad venire vi et armis* not guilty, but saith nothing of the wounding, which cannot be justified; and therefore this plea is not good. —For this reason it was clearly resolved that the plea was ill.

In trespass of assault, battery, wounding, and false imprisonment, the plea must answer the whole charge.

Post. 177. 8. Mod. 120. 218. 339.

ANONYMOUS. But THE COURT inclined that *the substance* of the plea was well enough. THE CHIEF JUSTICE and SCROGGS, *Justice*, were of opinion, that a man may as well send for his servant from a conventicle as from an alehouse, and may keep him from going to either of those places: and THE CHIEF JUSTICE said, that he once knew it to be part of a marriage-agreement that the wife should have leave to go to a conventicle.

An amendment allowed after demurrer and before judgment. 1. Sid. 107. Cowp. 407. 481.

But in this case leave was given to amend the plea, and put in *quoad vulnerationem* not guilty: and IT WAS HELD, that though the parties had joined in demurrer, yet the defendant might have liberty to amend before judgment given.

Turner's Case, ante, 144. and the cases there cited.

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Case 99.

* Singleton *against* Bawtree, Executor.

In *assumpsit* against a person as executor, a *plea* in abatement, that the testator made another person executor, who proved the will, and took upon him the execution thereof, must traverse that the defendant was executor. Ante, 60.

ASSUMPSIT against the defendant as *executor*, who pleads, that the testator made one *J. S.* executor, who proved the will, and took upon him the execution thereof, and administered the goods and chattels of the testator; and so concludes in abatement, *et petit judicium de brevi*, with an averment that *J. S. superstes et in plenâ vitâ existit.*

To this plea the plaintiff demurred, Because the defendant ought to have traversed ABSQUE HOC that he was executor, or administered as executor; and so are all the pleadings, 9. *Hen.* 6. *pl.* 7. 4. *Hen.* 7. *pl.* 13. 7. *Hen.* 6. *pl.* 13.

Cro. Eliz. 281. Cro. Jac. 221. 8. Mod. 31. 306. 10. Mod. 21. 25. 37. 140. 12. Mod. 314. Comyns, 156. 247. 302. 582. Stra. 60. Ld. Ray. 63. 824. 4. Bac. Abr. 70, 71.

But PEMBERTON, *Serjeant*, *for the defendant*, said, That there is a difference when letters of administration are granted in case the party die intestate, and when a man makes a will and therein appoints an executor, for in that case the executor comes in immediately from the death of the testator; but when a man dies intestate, the ordinary hath an interest in the goods, and therefore he who takes them is EXECUTOR *de son tort*, and may be charged as such; but it is otherwise generally, where there is a will, and a rightful executor who proveth the same, for he may bring a *trover* against the party for taking of the testator's goods, though he never had the actual possession of them (*a*); and therefore the taking in such case will not make a man EXECUTOR *de son tort*, because there is another lawful executor. But it is true, that if there be a special administration it is otherwise; as if a stranger doth take upon him to pay debts or legacies, or to use the intestate's goods, such an express administration will make him EXECUTOR *de son tort*, and liable, as in *Read's Case*, 5. *Co.* 33. So in this case the defendant pleads, that *J. S.* was executor, which *primâ facie* discharges him; for to make him chargeable the plaintiff ought in his replication to set forth the special administration, that though there was an executor, yet before he assumed the execution or

(*a*) Savil, 133. Cro. Eliz. 377. Latch. 214.

proved

proved the will the defendant first took the goods, by which he became executor of his own wrong, and so to have brought himself within this distinction (which was the truth of this case), and that would have put the matter out of dispute; which not being done, he held the plea to be good; and so prayed judgment for the defendant. SINGLETON *against* BAWTREE.

* THE COURT were of opinion, that *primâ facie* this was a good plea; for where a man *confesses and avoids*, he need not traverse (*a*); and here the defendant had avoided his being chargeable as EXECUTOR *de son tort*, by saying that there was a rightful executor who had administered the testator's whole estate. But the surmise of the plaintiff and the plea of the defendant being both in the affirmative, no issue can be joined thereon (*b*); and therefore the defendant ought to have traversed that he was executor, or ever administered as executor; the rather, because his plea gives no full answer to the charge in the declaration, being charged as executor, who pleads that another was executor; and both these matters might be true, and yet the defendant liable as EXECUTOR *de son tort*, which (notwithstanding *iniquum non est præsumendum*) may be well intended here. * [169]

And so judgment was given against the defendant, that this was no good plea.

(*a*) 2. Saund. 28. (*b*) Cro. Jac. 579. 1. Sid. 341. 1. Saund. 338.

Adams *against* Adams. Case 100.

DEBT UPON BOND TO PERFORM AN AWARD, so that it be made before or upon the twenty-second day of *December*, or to choose an umpire.—The defendant pleads, no award made.—The plaintiff replies, and sets forth an award, and assigns a breach.—The defendant demurs,

On a submission, *so that* the award be made on or before such a day, or that the arbitrators may chuse an umpire, they may chuse an umpire after the day named.

FIRST, That here is no good award, because the arbitrators were to make it before or upon the twenty-second day of *December*, and, if they could not agree, to choose an umpire. Now the award set forth in the replication was made by an umpire chosen after the twenty-second day of *December*, which the arbitrators had not power by the submission to choose.—*Sed non allocatur*: because they might have made their award upon the twenty-second day of *December*, and therefore could not choose an umpire till afterwards; for their power was only determined as to the making an award.

S.C. Danv. 538. 1. Roll. Abr. 262. Hard. 44. 3. Lev. 263. 2. Vent. 114. 5. Mod. 457. 1. Salk. 72. 3 Burr. 1474. 1. Com. Dig. 391. Kyd on Awards, 54.

SECONDLY, Because the umpire recites, that the parties submitting had bound themselves to stand to his award, which is not true.—*Sed non allocatur*; because it is but recital.

A mis recital in an award will not vitiate it.

Post. 309. 227. Kyd on Awards, 160.

An award to pay two sums at different times, and that the party should give one release immediately, is bad.

THIRDLY, The award is, That the defendant should pay the plaintiff two sums at several times, and that several releases shall be given presently, and so the bond and the money would be discharged; and for that reason the awarding the release was void against the plaintiff, and by consequence there is nothing on * his side to be done.—And THE COURT were all of opinion, that
* [170] for this last reason the award was not good.

3. Lev. 188. 413. 2. Lev. 3. Salk. 74. 1. Ba. Ab. 140. Ld. Ray. 963 Kyd on Awards, 161. 1. Com. Dig. 385.

BALDWIN, *Serjeant*, who was of counsel *for the plaintiff*, said, that it was an exception which he could not answer if true; but he said, that the award was, not that releases should be given presently, but, that the money should be paid and releases given; by which it appears, by the very method and order of the award, that the general releases were not to be given till after the money paid.—And that being the case THE COURT were clear of opinion, that it was well enough: and so judgment was given for the plaintiff.

Case 101.

Brook *against* Sir William Turner.

'A wife, by the consent of her husband, may make an *appointment* in the nature of *a will*.

S. C. 1. Mod. 211. S. C. 3. Keb. 624. Abr. Eq. 66. 171. Prec Ch. 44 84. 255. Comyns, 67. 11. Mod. 221. 1. Vern. 244. 408. 2. Vern. 104. 329. 535. 1. Peer. Wms. 126. 2. Peer. Wms. 82. 144. 243. 316. 341. 364. 496. Stra. 891. 1111. 1118. 2. Bl. Com. 498. 1. Burr. 431. Dougl. 707. 2. Brown's Rep. Ch. 391. 3. Brown's Rep. Ch. 8.

PROHIBITION TO THE SPIRITUAL COURT to prove the will of *Philippa Brooks*, by *Sir William Turner* her executor.

A trial at the bar was had, in which the case was thus:

James Phillips, by will in writing dated 24. *April* 1671, *inter alia* gave to *Philippa* for life, in lieu and full of her dower, all his houses in *Three Crown Court* in *Southwark*, purchased by him of one *Mr. Keeling*; another house in *Southwark*, purchased of one *Mr. Bowes*; and all his houses in *New Fish Street*, *Pudding Lane*, *Botolph Lane*, *Beer Lane*, *Duxford Lane*, and *Dowgate*, *London*; and died. Afterwards, there being a treaty of marriage between the plaintiff *Mr. Brooks* and *Philippa Phillips*, it was agreed, that all the said houses and rents, and profits thereof, and all debts, ready money, jewels, and other real and personal estate whatsoever, or wherein *Philippa*, or any in trust for her, were interested or possessed, should at any time, as well before as after the marriage, be disposed in such manner as should be agreed on between them. Thereupon by indenture tripartite, between *Mr. Brook* of the first part, the said *Philippa Phillips* of the second part, and *William Williams* and *Francis Gillow* of the third part, reciting the said will of *James Phillips* and the said agreement, the said *Philippa*, in consideration of a shilling paid to her by *Williams* and *Gillow*, did, with the full and free consent of the said *Edward Brook* the now plaintiff, "grant, bargain, and sell, to the "said *Williams* and *Gillow*, all the said houses devised by the last "will of the said *James Phillips*, in trust that the said trustees "should permit her to receive and enjoy the whole rents and "profits of all * the houses purchased of *Mr. Keeling*, and of all
* [171] "the houses in *Beer Lane*, and of two of the houses in *Broad* "*Street* in the possession of *James* and *Worsley*, and the quarter's "rent

"rent only due at *Christmas* then last past, and no more, saving "to *Philippa* all former rents and arrears thereof, to be received "by her, and not by *Mr. Brook*, and to be employed as therein-"after was mentioned." And upon this farther *trust*, that after *Mr. Brook*'s death, in case the said *Philippa* survived, that then the trustees should permit *Philippa* and her assigns from time to time to grant, sell, and dispose, of the rest of the premises, and all others whereof she was seised or possessed, as she should think fit; and also to receive, dispose of, and enjoy, all the rents and profits of the premises (not thereby appointed to be received by the plaintiff), for her only particular and separate use, and not for the use of the plaintiff, without any account to be given for the same, and not to be accounted any part of *Mr. Brook*'s estate; and that the acquittances of the said *Philippa* be good discharges against the plaintiff; and the said trustees to join with *Philippa* in the sale and disposition of the premises. And *Philippa*, in farther consideration of the said marriage, agreed to pay to *Mr. Brook* on the day of marriage 150l. and to deliver him several bonds and securities for money in the said indenture particularly named. And the said *Philippa*, in further pursuance of the said agreement, and in consideration of a shilling paid to her by the said trustees, did, with the like assent, assign to them all her jewels, rings, money, &c. and other her real and personal estate, upon trust that they should permit her to enjoy the same to her own separate and distinct use, and to dispose thereof from time to time, as well before the said marriage as afterwards, as she should think fit, without any account; and for want of such limitation or appointment, in trust for her, her executors, administrators, or assigns; and the plaintiff not to hinder or impeach the same, and not to be taken as any part of his estate, or be subject to his debts, legacies, or engagements. And the plaintiff covenanted, that if the marriage took effect the trustees should quietly enjoy the premises, and *Philippa* to dispose thereof without trouble or molestation by him, his executors, &c.; and that *Philippa* (notwithstanding the marriage) should at any time, either before or after, have liberty, by *deed* or *will in writing* by her published in the presence of two or more credible witnesses, or otherwise howsoever, at her pleasure, to give and dispose all her real and personal estate, goods, chattels, &c. whereof she was possessed before the said intended marriage, *or at any time after, or any other person in trust for her (except such part thereof as was thereby agreed to be paid to and received by the plaintiff), to such person or persons, and to such use and uses, intents and purposes, as she should think fit; and that the plaintiff should assent thereunto, and not impeach the same in law or equity. The marriage shortly afterwards took effect; and *Philippa* by *will in writing* gave all her estate away in legacies and charitable uses; and she devised to the plaintiff twenty pounds to buy him mourning, and gave to *Sir William Turner* the defendant one hundred pounds, and made him executor; and she devised to *Mr. Hays* and to *Mr. Grace* twenty pounds a-piece, whom

BROOKE *against* SIR WILLIAM TURNER.

* [172]

Brook against Sir William Turner.

whom she made overseers of her will, and died. There was neither *date* nor *witnesses* to this will, save only the month and year of Our Lord therein-mentioned; and this will not being proved in the spiritual court, the plaintiff moved for *a prohibition*, and the defendant took issue upon the suggestion.

In which case these points were resolved by THE COURT:

A husband who has agreed before marriage that his wife may make a *will*, may disagree to it after her death.— *Sed quære.*
3. Com. Dig. 15.
2. Brown's Ch. Rep. 391.
3. Brown's Ch. Rep. 8.

FIRST, If there be an agreement before marriage that the wife may make a will, if she do so it is a good will, unless the husband disagrees; and his consent shall be implied till the contrary appear. And the law is the same though he knew not when she made the will, which when made it is in this case, as in others, ambulatory till the death of the wife, and his dissent thereunto; but if after her death he doth consent he can never afterwards dissent, for then he might do it backwards and forwards *in infinitum*. And if the husband would not have such will to stand, he ought presently after the death of the wife to shew his dissent.

If a husband consent that his wife shall make a will, his assent given to such will after her death cannot be revoked.
Eq. Cas. Abr. 66.
Carth. 511.
Salk 235.
Ld. Ray. 515.

SECONDLY, If the husband consent that his wife shall make a will, and accordingly she doth make such a will and dieth, and if after her death he come to the executor named in the will and seem to approve her choice, by saying, "he is glad that she had "appointed so worthy a person," and seemed to be satisfied in the main with the will, and recommended a coffin-maker to the executor, and a goldsmith for making the rings, and a herald-painter for making the escutcheons, this is a good assent, and makes it a good will, though the husband, when he sees and reads the will (being thereat displeased) opposes the *probate* in the spiritual court by entering *caveats* and the like; and such disagreement after the former assent will not hurt the will, because such assent is good in law, though he know not the particular bequests in the will,

* [173]

If a husband consent before marriage that his wife shall make a will, such consent shall be intended to have continued after her death, unless the contrary appear.

* THIRDLY, When there is an express agreement or consent that a woman may make a will, a little proof will be sufficient to make out the continuance of that consent after her death; and it will be needful on the other side to prove a disagreement made in a solemn manner; and those things which prove a dissatisfaction on the husband's part may not prove a disagreement, because the one is to be more formal than the other; for if the husband should say, that "he hoped to set aside the will," or by a suit or otherwise "to "bring the executor to terms," this is not a dissent.

1. Roll. Abr. 608. 1. Mod. 211.

HILARY TERM,

The Twenty-Eighth and Twenty-Ninth of Charles the Second,

IN

The Dutchy Court.

Sir Thomas Ingram, *Knt. Chancellor.*

Sir Robert Howard *against* the Queen's Truftees and the Attorney General. Cafe 102.

UPON A BILL exhibited in THE DUTCHY COURT; the queftion was, Whether the ftewardfhip of a manor was grantable in reverfion or not?

Quære, If the ftewardfhip of a manor is grantable in reverfion?

THE ATTORNEY GENERAL and QUEEN'S COUNSEL, BUTLER and HANMORE, held that it was not: but PEMBERTON, *Serjeant*, and MR. THURSBY would have argued to the contrary; for they faid it might be granted in fee, or for any lefs eftate, and fo in reverfion, for it may be executed by deputy *(a)*.

But this queftion arifing upon a plea and demurrer, the debate thereof was refpited till the hearing of *the caufe*, which was the ufual practice in chancery, as NORTH, *Chief Juftice*, who affifted THE CHANCELLOR *of the Dutchy*, informed the Court.

And he faid, that in all courts of equity the ufual courfe was, when a bill is exhibited to have money decreed due on a bond, upon a fuggeftion that the bond is loft, there muft be oath made of it, for otherwife the caufe is properly triable at the common law; and fuch courfe is to be obferved in all the like cafes, where the plaintiff by furmife of the lofs of a deed draws the defendant into equity; but if the cafe be proper in its own nature for a court of confcience, and in cafe where the deed is not loft, the remedy defired in chancery could not be obtained on a trial at law,

In all bills in equity, where the lofs of a deed is fuggefted, in order to give a jurifdiction to the Court, the fact muft be verified by affidavit.

Caf. Chan. 11. 231. 1. Vern. 180. 247. 310. Jones, 126. Abr. Eq. 167. 8. Mod. 86. 10. Mod. 8. Gilb. Eq. Rep. 1. Prec. Ch. 536. 1. Vern. 59. 2. Vern. 35. 501 98. 380. 476. 561. 1. Peer. Wms, 731. 2. Peer. Wms. 541. Mitford's Pleadings, 181, 182.

(a) See this queftion determined in Howard *v.* Wood, T. Jones, 126.

 there,

SIR ROBERT HOWARD *against* THE QUEEN'S TRUSTEES AND THE ATTORNEY GENERAL

there, though it be alledged : the ath be made of it: as if there be a deed in which there is a covenant for farther assurance, and the party comes in equity, and prays the thing to be done *in specie*, there is no need of an oath of the loss of such deed, because if it is not lost the party could not at law have the thing for which he prayed relief, for he could only recover damages.

* [174]

On a bill of foreclosure the mortgagee pays no costs.

* NOTE ALSO, That he said in the case of one *Oldfield*, that it was the constant practice, where a bill is exhibited in equity to foreclose the right of redemption, if the mortgagor be foreclosed he pays no costs.

Moseley, 45. 1. Eq. Cas. Abr. 92. 2. Powell, 340. 308. 1. Harrison's Chancery, 683.

And though it was urged for him, that he should pay no costs in this case, because the mortgagee was dead, and the heir within age, and the money could not safely be paid without a decree, yet it being necessary for him to come into equity, he must pay for that necessity.

Mortgagor in fee cannot redeem till the heir comes of age.

NOTE ALSO, The difference between a mortgage in fee, and for years; for if it is in fee, the mortgagor cannot have a reconveyance, upon payment of the money, till the heir comes of age.

If tenant for life and the remainder-man join in a mortgage-deed, the estate on redemption shall be restored to the tenant for life.

IT WAS AGREED in this case, by THE COURT, that if there be tenant for life, remainder in fee, and they join in a deed purporting an absolute sale, if it be proved to be but a mortgage he shall have his estate for life again, paying *pro ratâ*, and according to his estate; and so it shall be in the case between tenant in dower and the heir.

HILARY

HILARY TERM,

The Twenty-Eighth and Twenty-Ninth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice,*

Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.* } *Justices,*
Sir William Scroggs, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Loyd *against* Langford.

Case 103.

If a lessee for years re-demise his whole term to the lessor, with a reservation of rent, it operates as a surrender of the original lease; and therefore he cannot maintain debt for rent against the *executor* of the original lessor, but must seek relief in equity;

A SPECIAL VERDICT.—The case was: *A.* being tenant in fee of lands, demised the same to *B.* for seven years. *B.* re-demises the same lands to *A.* for the said term of seven years, reserving twenty pounds rent *per annum.* *A.* dies; his wife enters as guardian to the heir of *A.* her son, and receives the profits. *B.* brings DEBT against her as executrix *de son tort*, in the *debet et detinet.*

The question was, Whether this action would lie or not?

BALDWIN, *Serjeant*, who argued *for the plaintiff*, held, that it did lie; for though the rent reserved in this case did not attend the reversion, because the lessee had assigned over all his term, yet an action of debt willl ie for that rent upon the contract. *Cro. Jac.* 487. *Witton v. Bye*, 45. *Edw.* 3. *pl.* 8. 20. *Edw.* 4. *pl.* 13.

but if a lessee *assign* his whole term to a *stranger*, he may bring debt for the rent reserved on the contract against him or his personal representatives.—Dyer, 4. 247. 3. Co. 23. Cro. Eliz. 555. 633. 715. Cro. Jac. 334. Poph. 120. 2. Roll. Rep. 132. Moor, 600. Latch. 260. 1. Sid. 266. 2. Vent. 209. 234. 3. Mod. 326. 1. Lev. 12[illegible]. 3. Lev. 295. 1. Salk. [illegible]. 4. Mod. 71. 10. Mod. 162. 12. Mod. 528. 2. Vern. 421. Stra. 1089. 1221. Ld. Ray. 82. 99. 737. 2. Com. Dig. "Debt" (E.) and (F.) 3. Bac. Abr. 460. 4 Bac. Abr. 341.

Covenant

Loyd against Langford. Covenant will lie upon the words "yielding and paying." If then here is a good rent reserved, the wife, who receives the profits, becomes executrix *de son tort*, and so is liable to the payment. It hath been held, that there cannot be an executor *de son tort* of a term, but the modern opinions are otherwise; as it was held in the case of *Potter v. Sweetman, Trinity Term* 1653, in the king's

*[175] bench (*a*); and * that an action of debt will lie against him. Indeed

(*a*) Stiles, 406. 431. Godolp. 193. such an executor cannot be of a term *in futuro*, and that is the resolution in the case of *Kenrick v. Burgess, Moor*, 126. (*b*) where, in ejectment upon *not guilty* pleaded, it appeared that one *Okeham*

(*b*) 2 Godolp. 99. had a lease for years of the lands in question, who died intestate, which lease his wife assigned by parol to *Burgess*; and then she takes out letters of administration, and assigns it again to *Kenrick*, who by the opinion of the Court had the best title. But if one

(*c*) Sed Vide 1. Show. 242. enter as executor *de son tort*, and sell goods, the sale is good (*c*); which was not so in this case, because there was a term in reversion, whereof no entry could be made; for which reason there could be no executor *de son tort* to that, and therefore the sale to

Carth. 166. 2. Vent. 242. 2. Vern. 421. 2. Stra. 1089. 1221. 2. Bac. Abr. 388, 389. *Burgess* before the administration was held void. And that there may be an executor *de son tort* of a term, there was a late case of *Stevens v. Carr* adjudged in *Trinity Term* 22. *Car.* 2. which was, Lessee for years rendering rent dies intestate; his wife takes out letters of administration, and afterwards marries a second husband; the wife dies, and the husband continues in possession and receives the profits: it was agreed, that for the profits received he was answerable as executor *de son tort*, and the Book of 10. *Hen.* 11. was cited as an authority to prove it.

Pemberton, *Serjeant*, *for the defendant*, would not undertake to answer these points which were argued on the other side, but admitted them to be plain against him; for he did not doubt but that debt would lie upon the contract, where the whole term was assigned, and that there may be an executor *de son tort* of a term. But he said, that which was the principal point in the case was not stirred: the question was, Whether an action of debt will lie against the defendant as executor *de son tort*, where there is no term at all? for it is plain there was none in being in this case; because when the lessee re-demised his *whole term* to the lessor, that was *a surrender* in law, and as fully as if it had been actually surrendered; and therefore this was quite different from the case, where lessee for years makes *an assignment* of his whole term to a stranger, debt will lie upon the contract there, because an interest passes to him in reversion; and as to this purpose a term is *in esse* by the contract of the parties, and so it would here against the first lessor, who was lessee upon the re-demise: but now because of the

[176] surrender, the heir is intitled to enter, and the * mother, who is the defendant, enters in his right as guardian, which she may lawfully do. If, therefore, debt only lies upon the contract of the testator, as in truth it doth where the whole term is gone, the plaintiff cannot charge any one as executor *de son tort* in the *debet et detinet*. And the whole term is gone here by the re-demise,

which

which is an absolute surrender, and not upon condition; for in such case the surrenderor might have entered for non-performance, and so it might have been revived. LOYD against LANGFORD.

And of this opinion was THE WHOLE COURT in both points, and would not hear any farther argument in the case. The plaintiff having no remedy at law, the Court told him that he might seek for relief in chancery, if he thought fit.

Harman's Case. Case 104.

COVENANT.—The breach assigned was, that the defendant did not repair. He pleads generally, *quod reparavit, et de hoc ponit se super patriam*.—This was held good after a verdict.

In covenant, "quod reparavit" generally is good after verdict.—2. Barnes, 284. 10. Mod. 228. 303 329. Lutw. 316. 3. Mod. 69. 12. Mod. 406. 413. Ld. Raym. 168. 284. 1416. 5. Com. Dig. "Pleader" (2. V. 16.). 1. Bac. Abr. 543, 544.

Quadring *against* Downs and Others. Case 105.

WRIT OF RIGHT OF WARD.—The case was, *Sir William Quadring* being seised of lands in fee, by deed and fine settles them upon his son *William* and his wife for their lives, the remainder to the second son in tail, with divers remainders over. The grandfather dies; the father and mother dies; the eldest son dies without issue; and so the land came to the second son. The plaintiff intitles himself as guardian in socage to the wardship, both of the person and lands of the infant, whom the defendant detained.

Wardship cannot be where there is no descent. Co. Lit. 88. Abr. Eq. 260. Gilb. Eq. Rep. 172. 8. Mod. 214. 9. Mod 116. 135. Prec. Ch. 106. 547. 1. Vern. 442. 2. Vern. 249. 471. 606. Cases Temp. Talb. 58.

NEWDIGATE, *Serjeant*, *for the defendant*, demurred, Because where there is no *descent* there can be no *wardship*, for the second son is in by *purchase* and not by *descent*; for here is no mention of the reversion in fee, and therefore it may be intended that it was conveyed away: and besides, if it should be intended to continue to *Sir William Quadring*, the grandfather, after this settlement, yet it cannot be thought to * descend to the ward, because it is not said who was heir; for though it be said that the father of the ward was son to *Sir William*, yet it is not said, "son and heir."

* [177]

Stra. 168. 982. 1076. 1. P. Wms. 703. 2. Peer. Wms. 112. 561. 3. Peer Wms. 116. 118. 154. Ld. Raym. 131. 1334. 3 Co. Dig. 414.

THE WHOLE COURT was of that opinion in both points; for there must be *a descent*, or else there can be no *wardship*; and it doth not appear that any descent was here, because it is not said that the reversion did descend, nor who was heir to *Sir William*: which the plaintiff perceiving, prayed leave to amend; and it was granted.

IN THIS CASE it was said at *the bar*, that one might be a ward in socage, though he be in by *purchase*; for the guardian is to have no profit, but is only *a curator*, to do all for the benefit of the ward; and so there need be no *descent*, as is necessary in the case of a ward in chivalry; for that being in respect of the tenure, the guardian is to have profit.

Quære, If there can be a guardian of an infant who claims by purchase? Co. Lit. 88. 3. Co. Dig. 414.

NORTH,

The court of chancery may oblige a guardian to give security.—9. Mod. 173. 3. Ch. Rep. 59. 2. Com Dig. 231. 2. Bac. Abr. 679. 1. Harrison's Chan. 765.

NORTH, *Chief Justice*, said, he knew, where there was some doubt of the sufficiency of the *guardian in socage*, that the court of chancery made him give good security.

Case 106. Harding *against* Ferne.

A justification under a *fi. fa.* is bad, if it appear that more was levied than was warranted by the writ.

Ante, 167. 8. Mod. 125. 218. 330. 5. Com. Dig. 349.

ASSAULT, BATTERY, AND IMPRISONMENT, until the plaintiff had paid eleven pounds ten shillings. The defendant pleads, and justifies by reason of an execution, and a warrant thereupon for *eleven pounds*, and doth not mention the *ten shillings*.—And upon demurrer for this cause, judgment was given for the plaintiff upon the first opening, because it appeared the defendant took more than was warranted by the execution.

Case 107. Ellis *against* Yarborough, Sheriff of Yorkshire.

Case lies not against the sheriff though he take insufficient bail, but he shall be *amerced* if the defendants do not appear.

ACTION OF ESCAPE.—The plaintiff sets forth, that the defendant arrested a man upon *a latitat* directed to him at the suit of the plaintiff, and afterwards suffered him to go at large. The defendant pleads (*a*) the statute of 23. *Hen.* 6. c. 10. that he took good and sufficient bail within the county according to the statute. The plaintiff replies, that he let him go at large, ABSQUE HOC that he took good and sufficient bail within the county.

* [178] To this the defendant demurred.

S. C. 1. Mod. 227. 231. S. C. 1. Freem. 219. S. C. Gilb. C. P. 22. Ante, 31. 93. Cro. Eliz. 624. 808. 1 Sid. 22. 436. 1. Vent. 55. . 1. Mod. 35. 177. 3. Salk. 314. 2. Saund. 5 . Comyns, 152. 264. 1. Barnes, 80. 2. Barnes, 78. Ld. Ray. 425. 722. 1564. Tidd's Practice, 105. 108. 161. 2. Term Rep. 174. Ab. 5. Burr. 19. Sid. 23. 2 Sind. C. Cro. Eliz. 624.

* SKIPWITH and BALDWIN, *Serjeants*, argued this Term *for the defendant*, That the plaintiff, in this case, cannot maintain an action of escape, for where the sheriff takes bail, no escape will lie against him,—FIRST, Because he is compellable by the statute to let the defendant to bail.—SECONDLY, If he have not the defendant ready at the return of the writ, he may be *amerced*, which is the proper remedy.—THIRDLY, This precept of letting the defendant to bail, being by act of parliament, is intended by the direction of the plaintiff himself, because all people are parties to the making of an act of parliament.

Many actions have been brought against sheriffs, upon suggestions that no bail have been taken, and for which an action on the case will lie; but where there is bail taken, the sheriff hath done the duty which he is commanded to do by the statute, and if the defendant do not appear, the sheriff is to be amerced, and he is the proper judge of the bail, the plaintiff is no ways concerned therein, whether good or bad. At the common law the defendant was to continue in prison till he had satisfied the plaintiff, to whom no benefit was intended by this statute, but rather an

(a) [illegible] to be a public statute, and [illegible] not now be pleaded

ease

case to the defendant, that he should be from thence discharged, giving good bail; and the reason why the statute mentions such bail is in favour of the sheriff also, to secure him from amerciaments. The bail being then for his indemnity, he is the sole judge both of their persons, number, and ability; for the statute requires two sureties, and that they shall be men within the county; yet if there be but one, and he not of the county, and if the bond taken by the sheriff for the appearance of the defendant be but forty pounds, and the debt due to the plaintiff be four hundred pounds, it is well enough, because the statute doth not restrain him to any sum or sureties, for he may take what sum he please to force the defendant to appear. And when this security is taken, the sheriff is neither compellable to assign it to the plaintiff, or he to take it. It is true, he doth usually assign it, but that is to discharge himself of the amerciaments, which is the way that the plaintiff should pursue where he doth imagine the bail to be insufficient (*a*). * If, therefore, this statute was made for the benefit and ease of the defendant, the security therein directed is for the indemnity of the sheriff; and therefore if no action will lie against him for taking of insufficient bail, it is as reasonable that no action should lie against him when he hath taken bail, which he is compelled to do; and so the traverse in this case is immaterial, and judgment ought to be given for the defendant.

ELLIS *against* YARBOROUGH.

Cro. Eliz. 672.

Cro. 286.

[179]

BARRELL, *Serjeant*, and GEORGE STRODE, *on the other side* argued, That an action of escape would lie against the sheriff, if he did not take good bail, which matter may be *traversed*; and though here, if the defendant had rejoined, the issue had been, whether sufficient bail within the county or not, yet that part of the issue had not been material, for the only matter had rested upon the sufficiency or insufficiency of the bail in general. Like a case adjudged in *Mich.* 14. *Car.* 2. *in B. R.* where a woman had power given her by her husband to make a will in the presence of two credible witnesses, it was pleaded that she made a will in the presence of *A.* and *B.* credible witnesses, and issue was thereupon joined, and it was found to be made in the presence of *C.* and *D.* who were credible witnesses; and this was held to be good, because the substance was found, *viz.* That it was made in the presence of two credible witnesses. The defendant therefore here ought to have taken good and sufficient bail to bring himself within the statute, and that is traversable; and the pleadings are well enough, for if there be good bail, it is not material in what county they live.

Ld. Ray. 865. 1521.

Ante.

NORTH, *Chief Justice*, upon the first argument of this case, inclined that an action of escape did lie at the common law against the sheriff; for it was clear that he was to keep the party arrested in prison until the debt was satisfied, and that if he had gone at large, it had been an escape; the sheriff then hath no excuse but

(*a*) But now see 4. & 5. *Ann.* c. 16. as to the assignment of bail-bonds.

by

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by this statute; and to entitle himself to any benefit thereby, he must pursue the very directions therein prescribed, and therefore ought to take good and sufficient bail, for otherwise the statute would be eluded, if it be left in his power to take what bail he pleases: and he was of opinion, that the plaintiff had an interest in the security, and therefore the sheriff was liable, if it was not good when first taken, but not if by any accident afterwards the bail miscarry or become insolvent.

And Wyndham, *Justice*, was of the same opinion, that the sheriff was liable: he differed only as to the manner of the * action, which he held should be a special action on t e case, setting forth the whole matter, and alledging that the defendant did not take sufficient bail.

* [180]

Atkins, *Justice*, said, the case depends upon the construction of that statute 23. *Hen.* 6. c. 10. which is very obscure, and the opinions various which have been upon it. It is plain, the sheriff is compellable to take bail; and that an action lies against him if he refuse such as are sufficient when tendered; but the question is now, Whether it will lie against him for taking those who are insufficient? And as to that he said, that many authorities were in our Books, that the taking of bail is left to the sheriff's discretion, and he is thereby to provide for his own indemnity; for he must return a *cepi corpus* upon the writ, he cannot return that he let him to bail according to the statute; and therefore inclined that the action did not lie.

Scroggs, *Justice*, *contra*. He said, that this statute designed the benefit of the creditor, that he might either get the sheriff amerced or have an action, in both which cases he might indemnify himself by the security he had taken. It is true, he may let the party to bail, but it is *sub modo*, it must be upon good bail; and if the sheriff be judge of the security, it is an argument that he is liable; for if he was not in danger, he need not take security.

But afterwards upon the second argument, the Chief Justice and the whole Court were of opinion, that judgment should be given for the defendant.

North, *Chief Justice*. The common law was very rigorous as to the execution of process. The *capias* was, *ita quòd habeas* the body at the day of the return; and if the sheriff had arrested one, it had been an escape to let him go. Before the making of this statute the sheriff usually took sureties for the appearance of the prisoner, and by this means used great extortion and took great sums of money; to prevent which mischiefs this statute was made and so designed. First, For the ease of the prisoner, the sheriff being now compellable to take security, which he was not obliged to do before.—Secondly, To prevent extortion, and therefore directs that a bond shall be taken in such manner and with such conditions as is therein mentioned. But the sheriff since the statute

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is much in the ſame condition * as before, for he is to make the ſame return of *cepi corpus*. It is true, he may now let him go upon bail, but as to the creditor he is to have him in court to anſwer his ſuit as before, and ſhall be amerced if he doth not appear at the return of the writ; ſo that though this ſtatute be an eaſe to the defendant, yet it is a burthen to the ſheriff, who runs a greater hazard ſince the making of this act than before; becauſe then he might keep him in priſon till the debt was ſatisfied, but now he is obliged to let him at large upon bail, from whom he is directed to take a bond, which he may keep in his own hands to indemnify himſelf: the Court can only amerce him, if the defendant do not appear at the return of the proceſs. And it is not material to the party whether the ſheriff take one or more ſecurity, that being in his diſcretion; ſome he muſt take, for otherwiſe it is directly in oppoſition to the ſtatute: neither is it material to the party whether they are ſuch as are ſufficient, for if they are not, and the defendant is thereupon diſcharged, this will not amount to an eſcape; becauſe nothing is done but what is purſuant to the ſtatute, and therefore he is no otherwiſe chargeable than by amerciaments. The ſtatute was made and intended for the benefit of the debtor, not of the creditor; and there might be ſome colour for the action if the ſheriff might return that he let him to bail, for then it might have been neceſſary to have alledged the ſufficiency of them, which might have been traverſed; but now he muſt purſue the ſubſtance of the ſtatute ſo far as to take bail; he is the proper judge of the ſufficiency, and when the bail is taken he muſt return a *cepi corpus*; ſo that he is only to be amerced till he bring in the body, but an eſcape will not lie againſt him *(a)*.

(*a*) In the caſe of Sir William Rouſe *v.* Patterſon, Hilary Term, 13. Geo. 2. in B. R. it was held, that an action lies againſt a ſheriff for taking inſufficient pledges in *replevin*. *Note to the* Fourth Edition.—See Rex *v.* Lewis, 2. Term Rep. 617. that the Court will not grant an *attachment* againſt a ſheriff for neglecting to take a *replevin-bond*.

Long's Caſe.

Caſe 108.

It is a contempt to make an arreſt in *Palace Yard ſedente Curiâ*.

ONE Long was arreſted in the *Palace Yard*, not far diſtant from the hall gate, the Court being then ſitting; and being an attorney of this court, he, together with the officer, was brought into court, and the officer was committed to the Fleet, that he might learn to know his diſtance.

S.C. 1. Lev. 166. 1. Ch. Rep. 207. Barnes, 378. 4. Com. Dig. 475. Inſt. 140. 1. Sid. 211. Tidd's Practice, 52. 4. Bac. Abr. 222. 3. Term Rep. 739.

An attorney arreſted on an attachment of privilege ſhall be diſcharged on filing common bail.—12. Mod. 102. 155. 535. 1. Barnes, 17. 137. 278. 338. 344. 352. 2. Barnes, 33. Stra. 76. 567. 837. 864. 986. 1043. 1065. 1094. 1143. 1. Ld. Ray. 399. 533. 2. Ld. Ray. 869. 978. 1173. 1567. 1. Com. Dig. "Bail" (K. 3.).

And becauſe the plaintiff was an attorney of the court of king's bench, who informed this Court, that his cauſe of action was for two hundred pounds; therefore the Court ordered that another

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LONG'S CASE. of the sheriff's bailiffs should take charge of the prisoner, and that Mr. ROBINSON, *the chief prothonotary*, should go along with him to the court of king's bench; which was done, and that Court, being informed how the case was, discharged the defendant upon filing of common bail.

*[182] * The writ upon which this *Long* was arrested was an *attachment of privilege*, which the Court supposed to be made on purpose to oust him of his privilege; for there was another writ against him at the sheriff's office at the suit of another person.

Case 109.

The Countess of Northumberland's Case.

Knights must be of the jury where a peer is concerned.

ADJUDGED, that where *a peer* is party, either plaintiff or defendant, two or more *knights* must be returned of the Jury (*a*).

S. C. 1. Mod. 226. Co. Lit. 156. 1. Vent. 246. Dyer, 107. 2. Stra. 1023.

In what case a *serjeant at law* may be returned a juryman.

3. Bac. Abr. 262.

4. Bac. Abr. 217.

It was said, that in *Cumberland* there was but one freeholder who was a knight, besides *Sir Richard Stote*, a serjeant at law.— And THE COURT were of opinion, that rather than there should be a failure of justice a serjeant of law ought to be returned a juryman, for his privilege would not extend to a case of necessity.

(*a*) But now by the 24. *Geo.* 2. c. 18. challenge to the panel for want of a knight where a peer is party is taken away.

HILARY TERM,

The Twenty-Eighth and Twenty-Ninth of Charles the Second,

IN

The King's Bench.

Sir Richard Rainsford, *Knt. Chief Justice.*

Sir Thomas Twisden, *Knt.*
Sir William Wylde, *Knt.* } *Justices.*
Sir Thomas Jones, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Bell *against* Knight. Case 110.

A statute imposing a duty on "every *fire-hearth* and "stove in any "house," extends to *smiths forges*, although there is a proviso exempting "any "*blowing-house*, "stamp, furnace, "or kiln," from the payment of such duty.
Post. 186.

IN AN ACTION OF TROVER, upon not guilty pleaded the jury found a special verdict, in which the point was upon the construction of the statute of 14. *Car.* 2. c. 10. for the establishing of an additional revenue upon the king, his heirs, and successors, for the better support of his and their crown and dignity; by which it is enacted, "that for every fire-hearth and stove in every "house the yearly sum of two shillings shall be paid to THE KING, "other than such as in the said act are exempted:" then comes A PROVISO, which saith, "that this act shall not extend to charge "any blowing-house, stamp, furnace, or kiln, &c."

The question now was, Whether *a smith's forge* shall be charged with this duty?

WINNINGTON, *Solicitor General*, conceived, that all fire-hearths are liable within the body of the act; that there is nothing to exempt them but what is in the exception; and that *a smith's forge* cannot be called *a blowing-house* within the intent of the act, notwithstanding the jury have found that smiths use bellows to blow their forges; for by *blowing-houses* such houses are meant as are in *Staffordshire* and *Suffolk* for the making of iron. These 10. Mod. 234.

BELL *against* KNIGHT.

were the blowing-houfes intended by the parliament to be excepted, and no other; for if fmiths forges had been meant thereby, thofe would have been inferted in the provifo as well as the other
* [183] things therein-mentioned. * Words are to be taken in a common underftanding; and if a traveller fhould enquire for *a blowing-houfe*, nobody would fend him to *a fmith's forge*.

Curia. By the opinion of THE WHOLE COURT it was adjudged upon the firft argument, that fmiths forges are liable to this duty.

And THE SOLICITOR faid, it had been lately adjudged fo in this court by the opinion of TWISDEN, WYLDE, and RAINSFORD, *Juftices*; and that HALE, *Chief Juftice*, was of the fame opinion.

But TWISDEN, *Juftice*, faid, that neither THE CHIEF JUSTICE nor HIMSELF gave any judgment upon the merits, but upon a point in pleading.

HILARY TERM,

The Twenty-Eighth and Twenty-Ninth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*

Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.* } *Justices.*
Sir William Scroggs, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Strode *against* The Bishop of Bath and Wells and Sir George Horner. Case 111.

QUARE IMPEDIT.—The plaintiff alledges, that *Sir George Horner* was seised in fee of the manor of *Dowling*, to which the advowson was appendant; that being so seised he presented one *Harding*, and then granted the next avoidance to the plaintiff; that the church became void by the death of the said *Harding*; and that now it belonged to him to present.

In *quare impedit*, a declaration that *A.* was seised in fee of the manor to which the advowson is appendant, and presented *B.* and then granted the next avoidance to the plaintiff, and that by the death of *B.* he was intitled to present, is good, without stating that the presentation to *B* was *tempore pacis.*—S. C. 1. Mod. 230. 10. Mod. 211. 296. 2. Stra. 1006. 1011. Ld. Ray. 200. 355. 5. Com. Dig. 316.

The bishop pleads, that he claimed nothing but as ordinary.

The incumbent pleads, that, at the time of the bringing of this writ, the church was full by the collation of the bishop upon a lapse.

The plaintiff replies, that *Sir George Horner* being seised in fee of the said manor of *Dowling*, to which the advowson of the church was appendant, did, *tali die et anno apud*, &c. present him as clerk, ABSQUE HOC that the church was full by collation.

 The

STRODE *against* THE BISHOP OF BATH AND WELLS AND SIR GEORGE HORNER.

The defendant rejoins, *protestando* that the church was full *tali die*; and for plea saith, that it was full upon the collation of the bishop, ABSQUE HOC that *Sir George Horner* did *tali die et anno*, &c. present the plaintiff as his clerk: and so traverses the inducement which the plaintiff had made to his traverse.

* [184]

To this the plaintiff demurred.

In *quare impedit*, if the incumbent plead *in bar* that at the time of the writ the church was full by *collation* on a lapse, and the plaintiff reply, that on such a day and year the patron presented *him* as clerk, with a *traverse* that the church was full by collation; A REJOINDER that the church was full by collation, with a *traverse* that the patron such *a day and year* presented the plaintiff, is bad; for it is *a departure* from the plea in *bar*.—Co Lit. 282. Vaugh. 62. 1. Saund. 21, 22. Hob. 104. 5. Com. Dig. 111.

GEORGE STRODE, *Serjeant*, took three exceptions to this rejoinder.

FIRST, That when the defendant pleads a matter in bar, and the plaintiff hath taken a traverse upon that, the defendant should then take issue upon that traverse, and so have * maintained his bar, from which he had *departed* here by traversing another matter. In a *quare impedit* the plaintiff declares, that *Sir Thomas Chichely* granted an advowson to one *East* and another in fee, to the use of the wife of the plaintiff for her jointure; and that she ought to present. The defendant pleads, that he is *parson imparsonée ex præsentatione regis*; for that *Sir Thomas Chichely* died seised as aforesaid of the manor and advowson held *in capite* by knight's service, which descended to his son an infant, and by office found of the tenure and descent the king was seised, and presented him, ABSQUE HOC that *Sir Thomas* granted to *East*. The plaintiff replies, *non habetur tale recordum de inquisitione*; and upon demurrer it was held, that this traverse of the inquisition was not good; for there shall not be a traverse upon a traverse but where the traverse in the bar is material to the title of the plaintiff; and in such case he is bound up to it. *Cro. Car.* 104, 105.

In *quare impedit*, if to a plea of collation in bar the plaintiff reply a presentation to himself *on such a day*, a rejoinder traversing the presentation *on the day mentioned* is bad; for it is making *the time* parcel of the issue, which is not good.

Ante, 145. Yelv. 122. Cro. Jac. 202. Cro. Car. 5[illegible] 1. Saund. 14. 2. Saund. 295. 2. Leon. 5.

SECONDLY, In his traverse he hath made *the time* parcel of the issue, *viz.* ABSQUE HOC that *tali die et anno præsentavit*, whereas it should have been *modo et formâ* only; and so is the case of *Lane v. Alexander*, where the defendant intitled himself by copy of court of roll 44. *Eliz.*; the plaintiff replies, that a copy was granted to him 1. *Junii* 43. *Eliz.*; the defendant maintained his bar, and traverseth the grant 1. *Junii modo et formâ*; and upon a demurrer it was said, that the rejoinder was not good, because the day and year of granting of the copy was not material, if it was granted before the defendant had his copy; and so the traverse ought to have been ABSQUE HOC that the queen granted *modo et formâ*; but it was adjudged, that the day ought not to be made parcel of the issue, and the traversing of it when it ought not so to be makes it substance and not form, so as to be aided by the statute of 27. *Eliz.* c. 5.

THIRDLY,

THIRDLY, As the defendant hath joined, they can never come to an issue; for he concludes his traverse, *et hoc paratus est verificare, unde petit judicium*, whereas he should have concluded to *the country*.

A traverse concluding with a verification.

3. Mod. 203. Cro. Jac. 14. 5. Com. Dig. 87. 109. Dougl. 95. note (10). and 429. note (1).

BARTON, *Serjeant*. Admitting the pleadings are not good, yet if the plaintiff's count is so likewise he cannot have judgment; and that it was so, he said, appears in that the plaintiff had not set forth a sufficient title; for he hath alledged, that *Sir George Horner* was seised in fee, and presented the plaintiff, who was instituted * and inducted, but doth not say that the presentation was *tempore pacis*; and therefore it shall be presumed most strongly against himself to be *tempore belli*, and a presentation must be laid *tempore pacis*; and so is the writ of assise of *darrein presentment*, F. N. B. 31.

In *quare impedit* the plaintiff must set forth sufficient title.

* [185]

Old Nat. Br. 25

1. Inst. 249.

THE COURT held, that the pleadings were not good, and that the count was good; for it is true, if a man count that he and his ancestors were seised in fee of an advowson, but declare of no presentation made by him or them, or if he declare of a presentation without an estate, in both cases it is naught, and good cause of demurrer; but here the count is both of an estate and a presentation.

Ld. Ray. 953. 2. Stra. 1006. 1011.

And this difference was taken: If a man get a fee by presentation, which is his title, he must alledge it to be *tempore pacis*; but if it be in pursuance of a right, as if an advowson be appendant to a manor, and he who hath right to the manor present, such presentation is good in time of war.

In what case it is necessary, in *quare impedit*, to alledge the presentation *tempore pacis*.

And so judgment was given for the plaintiff.

Vaugh. 57. Hob. 101.

Stevens *against* Austin. Case 112.

ADJUDGED, that if a man have common for a certain number of cattle belonging to a yard-land, he need not say *levant* upon the yard-land; *sed aliter* if it were for a common without number.

In prescribing for common for a certain number of cattle, it need not say they were *levant et couchant*.—1. Roll. Abr. 401. Cro. Jac. 27. 10. Mod. 15. 35. Ld. Ray. 726. 1. Mod. 6. 1. Saund. 346. 2. Com. Dig. 428.

HILARY TERM,

The Twenty-Eighth and Twenty-Ninth of Charles the Second,

IN

The King's Bench.

Sir Richard Rainsford, *Knt. Chief Justice.*

Sir Thomas Twisden, *Knt.*
Sir William Wylde, *Knt.* } *Justices.*
Sir Thomas Jones, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

* [186]

The Company of Ironmongers *against* Naylor and Others.

Case 113.

If an act of parliament impose a duty on "all "houses and "edifices whatsoever," with directions on non-payment to distrain, houses in the possession of a *corporation*, though unfinished, and never occupied by any tenants whatsoever, are liable to the duty; and the officers, on demand of payment made to, and refusal by, the corporation, may distrain as well the goods on the premises as elsewhere.—S C. 2. Jones, 85. S. C. Pollexf. 207. S. C. 1. Vent. 311. S. C. 3. Keb. 749. 757. 783. 805. Cowp. 84.

TRESPASS.—The jury by a special verdict find several acts of parliament, *viz.* the 14. *Car.* 2. c. 10. the 15. *Car.* 2. c. 13. and the 16. *Car.* 2. c. 3. for the better collecting of the duty arising by *hearth-money* by officers to be appointed by the king; which act provides, "that if the party refuse to pay the duty by the space of an hour, that then the officers with the constable may distrain." They also find, that the Company was seised in fee of five messuages, in which were thirty-five fire-hearths, in the month of *April* 1673; that the Company did never finish these messuages; and that from the time of the building, they stood all void, and unoccupied by any tenant or tenants whatsoever. * Then they find, that the collectors were lawfully authorised; and that such a day they demanded the duty for the fire-hearths in each of the said messuages, which they also demanded of the Company, and which they refused to pay; and thereupon they took the distress, and kept it till the Company paid the said duty: and so make a general conclusion, &c.

The

The queſtion was, Whether the owner of a new houſe uninhabited from the time of the building thereof ought to pay this duty during all that time?

MR. POLLEXFEN and MR. SYMPSON argued, that they ſhall not be chargeable with this duty: their general reaſon was, becauſe no duty ſhould ariſe to the king without ſome benefit to the ſubject. And as to that it was ſaid, That in this caſe both the revenue of the crown and the property of the ſubject are concerned, from which as from a root all theſe impoſitions ariſe to ſuſtain the public charge. And therefore it hath been the way of Judges, in the interpretations of ſtatutes, not only to conſider the benefit of the crown, but to regard what is convenient for the ſubject. There are two reaſons for impoſitions. FIRST, Such as are cuſtoms, *viz.* tonnage and poundage and private tolls, which come in lieu of other things, and ſo are *quid pro quo.* SECONDLY, Subſidies or grants from the people, which naturally ariſe in ſome proportion from a benefit to the ſubject. And under the laſt of theſe reaſons falls the preſent duty given by the act of 14. *Car.* 2. c. 10. only to proportion the revenue to the public charge of the crown; and therefore it is not to be thought that the parliament ever intended a duty to the king where the ſubject had no benefit, for *ex nihilo nihil fit:* and how can it be thought that a duty ſhould be paid before the ſubject hath any rent, which is the mother of the duty? for if a man expend a thouſand pounds in building, which is all he is worth, and the houſes ſhould happen not to be let, how can he then raiſe ſuch a ſum as muſt be paid to the king? And it is an objection of no weight to ſay, if this duty muſt not be paid till the houſes are let, then the revenue of the king depends upon a contingency, becauſe all duties which come to the crown do depend upon ſuch.

THE NEXT THING to be conſidered is the act itſelf: and as to that,

[187] * FIRST, It muſt be taken as an act which gives a new duty to the crown, and thereupon ſuch conſtruction ought to be made, that the ſubject's eſtate be not charged further than the words will bear; and for that reaſon it is to be taken in an ordinary ſenſe, and not to be ſtrained, though it had been in the caſe of an old duty; and for that the *Lord Anderſon's Caſe (a)* is a good authority, *viz.* the ſtatute of 33. *Hen.* 8. c. 30. makes "all manors, "which deſcend to any heir whoſe anceſtor was indebted to the "king by judgment, recognizance, obligation, or other ſpecialty, "chargeable for payment of the debt." Tenant in tail is bound in a recognizance to *S.* who is attainted; then tenant in tail dies, and his iſſue aliens *bonâ fide*; the king cannot extend the lands ſo ſold, becauſe the act ſhall not be conſtrued to mean all recognizances for the king's debts, though the words are general enough; and though it is not ſaid which way the debts ſhall come to the king, either by forfeiture, attainder, &c. yet they ſhall be taken

(a) 7. Co. 21.

in

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in an ordinary ſenſe, *viz.* ſuch debts as were due to the king originally; for which reaſon it has been always held where an act gives any-thing to the king and lays a charge upon the ſubject, in ſuch caſe it ought to have a moderate conſtruction. And that this duty is a gift cannot be denied, for it is called ſo in the very act, therefore ſuch ought the conſtruction to be; and the rather, becauſe it is more for the king's honour it ſhould be ſo; and both in this caſe as well as in conſtructions of his grants, the law hath more regard for his honour than for his profit.

Secondly, This being ſo called, a duty or tax by the very words of the act doth in the natural ſenſe import a proportion out of that in which the ſubject hath a benefit; and it will be ſcarce found that there hath been a general tax given to the king where the ſubject has rather received a loſs than any profit out of the thing taxed, becauſe it would be very hard to pay where a man cannot receive. In the caſe of *tonnage and poundage*, proviſion is made that the party ſhall have allowance if the goods be loſt by piracy, which was mentioned to ſhew how unlikely it was that the parliament ſhould intend a duty where the ſubject had a loſs. Ever ſince the making the ſtatute of 43. *Eliz.* c. 2. houſes that lay void and untenanted have neither paid to church nor poor, which alſo ſhews how the uſage hath been in caſes almoſt of the like nature.

See the 17. Geo. 2. c. 38.; and 1. vol. of Mr. Conſt's edition of Bott's Poor Laws, page 78.

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The next thing conſidered were the clauſes in this act of 14. *Car.* 2. c. 10. * First, The firſt clauſe gives a duty, *viz.* "that "every chimney and ſtove ſhall pay two ſhillings."—Secondly, The next clauſe is to bring this duty into a way of charge, *viz.* "that every *owner* or *occupier* ſhall give unto the conſtable an ac-"count of the number of hearths in writing, and the conſtables "to tranſmit ſuch accounts to the ſeſſions, there to be enrolled "by the clerk of the peace, and a duplicate to be ſent in to the "exchequer." From which it is to be obſerved, that where mention is made of bringing this duty into a charge, both "owners" and "occupiers" are named; but "the owner" is not named in any place where the payment of the duty is mentioned, but "the "occupier" only: ſo that from the very intent and reaſon of the act he cannot be chargeable. The account thus tranſmitted is to charge the inheritance, and therefore it concerns the owner to look after the charge; but for empty houſes he cannot be charged, becauſe the act takes no notice of them in the clauſe of payment, but are purpoſely omitted, that being laid on the occupier; and this appears by the proviso, which is ſtrongly penned for the ſubject, *viz.* "Provided that the payments and duties hereby charged "ſhall be charged only upon the occupier for the time being, &c. "and not on the landlord who let and demiſed the ſame;" ſo that by the body of the act every houſe is charged, which being general might have given ſome colour to charge the owner; but by the proviso the payment is reſtrained to the occupier, and if there be no ſuch there ſhall be no payment. It was ſaid, that it cannot be inſiſted upon that an owner is an occupier, becauſe the legal acceptance of the word "occupation" doth only intend an actual

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actual possession, and not a possession in law; and such is the meaning of the statute, by charging the occupier for the time being. If therefore the proviso extends to cases where tenants run away and pay no rent (as it certainly doth), because there is no occupier then in being; what difference can there be between that and this case, where the landlord in both hath no rent? for if he shall not pay where he cannot receive rent, why should he pay where he hath none to receive? And that this was the meaning of the parliament may further appear by a clause in the act of 16. *Car*. 2. c. 3. made for collecting this duty by officers appointed by the king, which doth not enlarge the former statutes, and by which it is enacted, "that if any occupier shall leave his house before any of the half-"yearly Feasts whereon this duty is appointed to be paid, * that "the next occupier shall be chargeable with the same for the said "half-year." Which clause had been altogether vain and of no use, if empty houses had been chargeable with this duty; for to what purpose was it to charge a succeeding occupier, when the house itself, though untenanted, was chargeable before? In this act also, which supplies the defects of the former, this duty is made payable to the officer upon demand at the house where the same shall arise and grow due, and that in case of refusal by the space of an hour the officer may distrain; which shews a demand must be where there may be a refusal, and no refusal can be where there is no occupier. There is also another clause which mentions both owner and occupier in this act, and which saith, "that no pro-"prietor, owner or occupier, shall be molested or charged, un-"less within two years after the duty accrued;" so that wherever a charge is laid, or an ease is given to the subject, the word "occupier" and sometimes both "occupier and owner" promiscuously are used; but where a payment is to be made, the owner is never mentioned; and if so, nothing shall be intended within either of the statutes to enlarge this duty upon the subject beyond the words and plain meaning thereof.—SECONDLY, There is another point in this case which concerns the king and all the people of *England*, that is, Whether the defendant here can be charged with a distress (supposing this duty is to be paid to the king) before any account of these hearths is transmitted into THE EXCHEQUER, which first ought to be done; or otherwise the consequence will be, that the officer may demand and take as much as he will at his pleasure, and the king may be likewise prejudiced in his revenue; for as the collector may have from the subject more than he ought, and more than he is empowered to take by the law, so he may pay the king less. The act directs, "that an account "shall be taken by the officers, and examined by the constables; "then to be transmitted to the sessions, there to be enrolled, and "from thence sent into THE EXCHEQUER." Now what occasion was there of all this solemnity, if the king was entitled to a distress upon a bare refusal? This being a rent-charge upon a man's inheritance, the king shall not be entitled to it but by matter of record; for he cannot take or part with any thing, neither can he

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have

have any eſtate or profit rendered him out of another man's eſtate, but by matter of record; ſo that it ſeems by the act that this account is neceſſary to be tranſmitted into THE EXCHEQUER, and * that the king is not entitled to a diſtreſs for this duty until that be actually done, which is not only matter of information to the crown, but in ſome meaſure entitles him to it, becauſe there is a penalty of five pounds laid upon the officer who ſhall neglect to bring in ſuch account; which ſhews, that the ſubject ought not to be charged before: for which reaſons judgment was prayed for the plaintiff.

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MR. HOLT and THE ATTORNEY GENERAL, *on the other ſide*, argued, that empty houſes ſhould pay this duty: for THE ATTORNEY GENERAL ſaid, that the words in the act were ſo expreſs, that he was of opinion that the very reading of them would clear the point in queſtion.—In their arguments two things were conſidered upon the ſtatute of 14. *Car.* 2. c. 10.—FIRST, The general clauſe which gives the duty in the body of the act. And SECONDLY, The diſcharge in THE PROVISO. And if this be in the body of the act, and not excepted in the proviſo, then the duty is to be paid. And as to that it was ſaid, that this duty was given in general words; by which it appears, that there was a deſign and intent to charge empty houſes, for "every dwelling-houſe, "edifice, or houſe whatſoever" is to pay this duty: and if every houſe, why not an empty houſe? It is true, a dwelling-houſe is not a houſe wherein there hath not been an inhabitant, but wherein ſomebody doth actually live; and if a man furniſh a houſe very well, if it is not inhabited, it is notwithſtanding an empty houſe, and ſuch a houſe as to ſome purpoſes in the law is not a dwelling-houſe; for it is not a manſion-houſe, ſo as to make it burglary for the breaking of it open. By the ſecond clauſe, "every owner "or occupier is to ſubſcribe the account to be ſent into THE "EXCHEQUER," by which it appears that thoſe words "owner "and occupier" are not there uſed in a different ſenſe; for if the occupier were only liable, the owner need not look after the ſigning the account of every hearth. The third clauſe takes notice, "that if it ſhould happen there be no occupier, then the officer "may go into the empty-houſe to examine if the account given "him be true." Now if an account is to be taken of ſuch houſes as are charged by this act, and an account is directed to be taken of empty houſes, then ſuch empty houſes muſt be charged; and this ſeemed to them to be * the intent and meaning of the Legiſlature, for there being a return to be made of empty houſes, if ſuch had not been intended to be charged, they would have directed a return alſo to have been made of the non-inhabitancy. And therefore they thought that ſomething more than "an occupier" was here meant, for otherwiſe the word "owner" had not been put in; the meaning of which muſt be, that dwelling-houſes come within the charge of occupiers, and empty houſes within the charge of the owners. THEN as to THE PROVISO, "that the duty hereby "ariſing ſhall be charged only upon the occupiers and dwellers

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"of

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"of such houses, their executors and administrators," that can in no sort extend to discharge an empty house, because it is not the subject matter of the proviso; for the design and purpose of it was not to discharge the duty, but to transfer the charge upon the tenant where the house was inhabited; for if a contrary construction should be made, then no duty should be paid at all by the owner himself if he should live in his own house. In the case of a *modus decimandi* it is payable by the occupier and possessor of the house, and the landlord is never charged but where there is no occupier.

As to the objection, That it is hard to pay a duty where a man has no profit; it was answered, That the act took care that men should not stop up their chimnies when once made, and that this duty was paid for many chimnies which were never used, and what profit can a man have of a chimney he never useth? If there had been an act that so much should be paid for every window, it is all one whether it had been for profit or pleasure, or whether the window had been used or not; and there is as much reason that a man should pay for houses never inhabited, as for such as have been inhabited and are afterwards without tenants. This act ought therefore to receive a favourable construction; the preamble whereof mentions that it was for "the encreasing of the king's revenue," which is *pro bono publico*, and which is for the peace and prosperity of the nation, and the protection of every single person therein; and though a particular inconvenience may follow, the party ought to submit. When a man builds a house, he proposes a profit, and it is not fit the king's duty should be contingent, and depend till he has provided himself of a tenant.—As to the other objection that was much relied on, *viz.* where the act speaks of *an account* to be given, it mentions both "owner" and "occu-
[192] "pier;" but where it directs the payment of * the duty the occupier only is named, by which it was inferred that he alone was chargeable. It was answered, that in the statute of 16. *Car.* 2. c. 3. owner, proprietor, and occupier, are used promiscuously, wherein "it is provided, that they shall not be charged unless "within two years after the duty accrued;" now if the owner was not chargeable, why is he mentioned there?

As to THE SECOND POINT, they conceived that the duty being payable to the king, he had a remedy by distress before the account was certified into THE EXCHEQUER; for the return was to inform the king what advantage he maketh of his revenue, and no process issued upon it; besides, the act vests the duty in him from *Lady-day* 1662; and by reason of that he may distrain. The king hath no benefit by returning of the account, that being only intended to prevent his being cheated, so that it is not *to entitle* but *to inform* him; it is only to return a just and true account; not but that it may be levied, and the king entitled before: and it is no inconvenience to the subject, if there be no such account returned; for if the officer distrain for more hearths than in truth there are, the subject has a proper remedy against him. The king suffers when returns are not made of such duties as he ought to have

have for the ſupport of his dignity; and becauſe he is liable to be defrauded in the managing of his duty, is it reaſonable that he ſhould loſe all? As to what was ſaid of the king's taking by matter of record; it is true, if he diveſt an inheritance, as in caſe of attainder, it muſt be by record; but here the very duty is given to him by the act itſelf, which makes it a different caſe. If the king ſhould be ſeiſed in fee of a great waſte, which happens to be improved by his tenants, and thereby tythes become due, it may be as well ſaid, that he ſhall have no *tythes* without record, as to ſay he ſhall have no *hearth-money* for houſes newly erected, whereby his revenue is increaſed. For theſe reaſons judgment was prayed for the defendant.

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And upon the ſecond argument judgment was given accordingly for him, That empty houſes are ſubject and liable to this duty.

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* Aſtry *againſt* Ballard.

Caſe 114.

TROVER AND CONVERSION FOR THE TAKING OF COALS.—Upon not guilty pleaded, the jury found a ſpecial verdict, That one *J. R.* was ſeiſed in fee of the manor of *Weſterly*, and being ſo ſeiſed did demiſe all the meſſuages, lands, tenements, and hereditaments, that he had in the ſaid manor, for a term of years to *N. R.* in which demiſe there was a recital of a grant of the ſaid manor, meſſuages, lands, tenements, commons, and *mines*, but in the leaſe itſelf to *R.* the word "*mines*" was left out. Afterwards the reverſion was ſold to the plaintiff *Aſtry* and his heirs by deed enrolled; and at the time of this demiſe there were certain *mines* of *coals* open, and others which were not then open; and the coals for which this action of trover was brought, were digged by the leſſee in thoſe *mines* which were not open at the time of the leaſe: and, Whether he had power ſo to do? was the queſtion.

A. being ſeiſed in fee of a manor, grants "the ſaid manor, meſſuages, lands, commons, and *mines*." The grantee leaſes all the meſſuages, lands, "tenements, "and hereditaments, that "he had in the "ſaid manor." The leſſee, notwithſtanding the word *mines* is omitted in the leaſe, may work all *mines* that were *open* at the time of the demiſe, but he cannot open a *new mine*.

It was ſaid, That when a man is ſeiſed of lands wherein there are *mines* open, and others not open, and a leaſe is made of theſe lands in which the mines are mentioned, it is no new doctrine to ſay, that the cloſe mines ſhall not paſs. Men's grants muſt be taken according to uſual and common intendment, and when words may be ſatisfied, they ſhall not be ſtrained farther than they are generally uſed; for no violent conſtruction ſhall be made to prejudice a man's inheritance, contrary to the plain meaning of the words. *A mine* is not properly ſo called until it is opened, it is but *a vein* of coals before; and this was the opinion of LORD COKE in point, in his *Firſt Inſt.* 54. *b.* where he tells us, that if a man demiſe lands and mines, ſome being opened and others not, the leſſee may uſe the mines opened, but hath no power to dig the unopened mines.

S. C. 2. Jones, 71.
S. C. 2. Lev. 185.
S. C. 3. Keb. 7c9. 725.
S. C. 1. Freem. 444.
5. Co. 12.
2. Roll. Abr. 816.
1c. Mod. 185.
Ld. Ray. 259.

And of this opinion was THE WHOLE COURT; and TWISDEN, *Juſtice*, ſaid, That he knew no reaſon why LORD COKE's ſingle opinion

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opinion ſhould not be as good an authority as FITZHERBERT in his *Natura Brevium*, or the DOCTOR AND STUDENT.

Caſe 115.

Ipſley *againſt* Turk.

* [194] WRIT OF ERROR UPON A JUDGMENT IN AN INFERIOR COURT.

On a judgment in an inferior court, when a *mayor* is the judge, it may either be pleaded in *abatement* in the court below, or aſſigned for error in the court above, that the mayor had not received the ſacrament purſuant to 13. *Car.* 2. c. 1.; for, that ſtatute having made his election *void* the proceedings were *coram non judice.*

S. C. 2. Jones, 81.
S. C. 2. Lev. 184.
S. C. 3. Salk. 249.
S. C. 3. Keb. 606. 665. 682. 721.
Cro. Car. 97.
Cro. Jac. 260.
1. Sid. 253.
2. Lev. 242.
T. Jones, 137.
Fitzg. 31. 37.
2. Barnes, 103. 235. 250.
9. Mod. 5.
10. Mod. 17. 142. 166. 172.
11. Mod. 143.
12. Mod. 105. 650.
Stra. 873. 1055. Ld. Ray. 390. 3. Bac. Abr. 727. See Cook *v.* Jones, Cowp. 728.

The error aſſigned was, That the *mayor*, who was *Judge* of the court, did not receive the *ſacrament* at any pariſh * church *(a)*, nor file any certificate *(b)*, ſo that he was not *mayor*; and judgment being given againſt the defendant before him, it was therefore *coram non judice*, like the caſe of *Hatch v. Nichols* (*c*); where, upon a writ of error brought upon a judgment in an inferior court, the error aſſigned was, That the ſtile of the court was "*Curia tent. coram J. S. ſeneſchallo*," who was not ſteward; and that was held to be an error in fact.

But *on the other ſide* it was inſiſted that this was not error, becauſe the acts of the mayor ſhould not be void as to *ſtrangers.* The ſtatute of 25. *Car.* 2. c. 2. for preventing of dangers which may happen from *popiſh recuſants*, diſables the party who is not qualified according to the act to hold an office, and if he execute the ſame afterwards, upon complaint made, and conviction, he ſhall forfeit five hundred pounds; ſo that as to himſelf, whatever he doth in his office is void; but it was never the intent of the act to work a miſchief or wrong to ſtrangers, for the law favours what is done by one in reputed authority; as if a biſhop be created, who, upon a preſentation made, admits a parſon to a benefice or collates by lapſe, the former biſhop not being deprived or removed, ſuch acts are good and not to be avoided. *Cro. Eliz.* 699. But admitting it to be an error, it cannot now be aſſigned for ſuch, becauſe the parties in pleading have allowed the proceedings to be good upon record, and there is judgment againſt the defendant; but if he had been taken upon that judgment, he might have brought an action of falſe impriſonment. *Cro. Jac.* 359. *Cro. Eliz.* 320.

WYLDE, *Juſtice.* You ſhall not aſſign that for error which you might have pleaded, eſpecially having admitted it by pleading; and one *Muſgrave's Caſe* was cited, which was, that there is an act of parliament which lays a tax upon all law proceedings, and makes them void if the king's duty be not paid; and it was adjudged, that if the duty was not paid, but admitted in pleading, you ſhall not afterwards alledge what before was admitted, *viz.* That the

(*a*) As directed by 13. *Car.* 2. ſt. 2. c. 1. ſ. 10. 12. But ſee 5. *Geo.* 1. c. 6. 1. Black. Rep. 229 Burr. Rep. 1013. Cowp. 530. 1. Hawk. P. C. 15.

(*b*) As directed by 25. *Car.* 2. c. 2.

(*c*) 1. Roll. Abr. 761.

duty

duty was not paid. Upon a writ of error in parliament it cannot be aſſigned for error, that the Chief Juſtice of the king's bench had not taken this oath; the ſame might be alſo of a writ of error in the exchequer chamber; for an error in fact cannot be there aſſigned.

IPSLEY *againſt* TURK.

But at laſt the judgment was reverſed *(a)*.

(a) The other Judges being of opinion, FIRST, That, by not taking the oaths, the office, and all acts done by colour of the office, was void by the 25. *Car.* 2. c. 2. SECONDLY, That the error was well aſſigned; for although it cannot be alledged that he was not *Judge*, yet it may be alledged that he was not *mayor*; for that without admitting ſuch an allegation the ſtatute would be uſeleſs. See S. C. T. Jones, 81.; and on the authority of this determination the ſame point was adjudged in Hilary Term, 31. & 32. *Car.* 2. T. Jones, 137. But it is ſaid by *Mr. Serjeant Hawkins*, that although the 13. *Car.* 2. c. 1. makes the election void, and the 25. *Car.* 2. c. 2. diſables the party to have, occupy, or enjoy their offices, yet it hath been ſtrongly holden, that the acts of one under ſuch a diſability, being inſtated in ſuch an office, and executing the ſame without any objection to his authority, may be valid as to ſtrangers. 1. Hawk. P. C. ch. 8. ſ. 3. And now by the ſtatute 5. *Geo.* 1. c. 6. "All perſons in the actual poſſeſſion of "any office, that were required by the "above act to take the ſacrament, &c. "ſhall be confirmed in their reſpective "offices, and none of their acts be "queſtioned, notwithſtanding their "omiſſion to take the ſacrament as "aforeſaid; nor ſhall they be removed "by the corporation, or otherwiſe proſecuted, for or by reaſon of ſuch omiſ"ſion, unleſs ſuch perſon be ſo re"moved, or ſuch proſecution com"menced, within ſix months after the election." See alſo the caſe of Crawford *v.* Powell, 2. Burr. 1013. and Rex *v.* Monday, Cowp. 530.

HILARY

HILARY TERM,

The Twenty-Eighth and Twenty-Ninth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt.* *Chief Justice.*
Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.*
Sir William Scroggs, *Knt.* } *Justices.*
Sir William Jones, *Knt.* *Attorney General.*
Sir Francis Winnington, *Knt.* *Solicitor General.*

* Higginfon *againſt* Martin and Hadley. Cafe 116.

TRESPASS AND FALSE IMPRISONMENT.—The defendant juſtifies by proceſs iſſuing out of the court of *Warwick*, upon a judgment obtained there; and ſets forth, that there was *a plaint* there entered in a plea of treſpaſs, to which the defendant appeared, *ſuper quo taliter proceſſum fuit*; that judgment was given againſt him, upon which he was taken and impriſoned. The plaintiff replies, That the cauſe of action did not ariſe within the juriſdiction of that court. The defendant rejoins, that the plaintiff is now *eſtopped* to ſay ſo, for that the declaration in the inferior court againſt the now plaintiff, did alledge the cauſe of action to be *infra juriſdictionem* of the court, to which he pleaded, and judgment was given againſt him. The plaintiff demurs.

To a juſtification of treſpaſs and falſe impriſonment under proceſs of an inferior court, if the plaintiff reply, that the cauſe of action did not ariſe within the juriſdiction the defendant may rejoin, that the plaintiff alledged in his declaration that it did ariſe within the juriſdiction. S. C. 1. Freem. 322. Moor, 422. Latch. 180. Cro. Jac. 184. 2. Com. Dig. 615. 1 Bac. Abr. 563.

NEWDIGATE, *Serjeant*, took exceptions to the plea.

FIRST, It is ſaid, a plaint was entered *in placito tranſgreſſionis*, but it is not ſaid what kind of treſpaſs it was, whether a *clauſum fregit* or other treſpaſs.

A juſtification to treſpaſs under proceſs of an inferior court need not ſtate *the kind* of treſpaſs. 2. Lev. 81. 1. Ld. Ray. 80. Cowp. 19.

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HOPKINS, *Serjeant*, answered this exception, that the plaintiff there sets forth, that *levavit quandam querelam in placito transgressio*, which was well enough.

THE COURT was of opinion, that there was no difficulty in this exception, but as to this thought the plea well enough.

A justification under process of an inferior court, stating the proceedings, which *taliter processum*, &c. is sufficient. Ante, 102.

SECONDLY, It is said that the defendant appeared, *super quo taliter processum fuit*, that judgment was given for the plaintiff, and no mention was made of any declaration; and the pleading *taliter processum est* in an inferior court is not good.

HOPKINS, *Serjeant*, answered, that "*taliter processum fuit*" is the shortest and better way of pleading, and that in a *scire facias* no thing is recited but the judgment: it is true, that in a writ of error the whole record must be set out, but that is not necessary here.

3. Lev. 403. Ld Ray 80. 1. Wilf 403. 2. Wilf. 5. and see the case of Rowland v Veale, Cowper, 18, where the point is determined.

THE COURT was also of opinion that there was no difficulty in this exception, and as to the "*taliter processum fuit*" they all held it well enough, and that there was no necessity of setting out all the proceedings here as in a writ of error.

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A justification under process of an inferior court need not state by what authority the court was held.

* THIRDLY, It did not appear by what authority the court at *Warwick* was held, whether by grant or prescription.—THE COURT was also of opinion, that as to this exception the plea was well enough, for it is said, that the borough of *Warwick* is *antiquus burgus*, and that the court is held there *secundum consuetudinem*, which is well enough.

In an action of false imprisonment, it is not a material *variance*, though *the writ* alledges an imprisonment *generally*, and *the declaration* state it to be *until* he paid five pounds.

But HOPKINS, *Serjeant*, said, let the pleadings be good or bad, if the declaration here be ill, the plaintiff cannot have judgment; and that it was so, he said, for that the writ alledged an imprisonment generally, but the count an imprisonment *donec* he paid 5l. 10s. which is variant, and the PROTHONOTARIES said, that the writ used always to mention *donec*, &c.

Dougl. 402. 665.

But THE COURT were all of opinion, that the count was well enough, for there was no matter therein contained which was not in the writ, the imprisonment was the gist of the action, and the *donec*, &c. might have been given in evidence, because it is only an aggravation and a consequence of the imprisonment, so that the count is not larger, but more particular than the writ.

If the declaration in an inferior court state that the cause of action arose *within the jurisdiction*, and a verdict be given for the plaintiff, the defendant on an action of trespass against the plaintiff and the officer of the court for arresting under its process cannot reply to a justification, that the cause of action did not arise within the jurisdiction.—Ante, 29. 1. Vent. 369. Lutw. 935. 1565. 2. Roll. Rep. 109. 3. Lev. 243. T. Jones, 214 Stra. 993. Ld. Ray. 229. 2. Wilf. 382. Cowp. 18. 2. Burr. 2035. 2. Com. Dig. 278.

FOURTHLY—NEWDIGATE, *Serjeant*, excepted, that the *justification* was ill, because the inferior court had no jurisdiction, and so the proceedings are *coram non judice*, for the plaintiff in his replication saith, that the trespass for which the recovery was had in the court of *Warwick*, was done at a place out of the jurisdiction of the court, which the defendant hath admitted by relying on his plea by way of *estoppel*.

HOPKINS,

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HOPKINS, *Serjeant*, answered, that it is too late now to questi the jurisdiction of the inferior court, after the party hath admitted it below. He ought first to have pleaded to the jurisdiction, but now is *estopped* by his own admittance there; and, since judgment is given on it, it is not now to be questioned. But, however, this being in the case of an officer, if it was out of the jurisdiction, he is bound to execute the process of the court, and so this is a good excuse for him. *Dyer*, 61. 10. *Co.* 77.

THE COURT agreed, that the officer in this case was to be discharged; for though the process be erroneous, he is to obey and not to examine. *Weaver v. Clifford*, *Cro. Jac.* 3. (*a*).

But the great doubt was, upon this fourth exception, as to the point of jurisdiction; and whether the other defendant, who was the plaintiff below, should be likewise discharged.

THE CHIEF JUSTICE, and WYNDHAM, *Justice*, as to that, were of opinion, That this was no good justification as to the plaintiff below; for if the cause of action did arise without the jurisdiction, of which he is bound to take notice, the proceedings *quoad* him are all *coram non judice*, and he cannot justify the serving of any process; so that if the trespass was done out of the jurisdiction of the court, the defendant below may bring an action against the plaintiff, and is not concluded here by the proceedings there, but may alledge the cause of action to arise out of the jurisdiction; and as to his being estopped by admitting of the jurisdiction below, that cannot be, because an admittance cannot give the court a jurisdiction where it had none originally; and so, he said, it was resolved in one *Squib's Case* (*b*), in a special verdict. * He who sues in an inferior court, is bound at his peril to take notice of the bounds and limits of that jurisdiction; and if the party, after a verdict below, prays a prohibition, and alleges that the court had no jurisdiction, a prohibition shall be granted; and it is no estoppel that he did not take advantage of it before. 1. *Roll. Abr.* 545.

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Mod. 601. Cro. Jac. 184. Yelv. 46. 1. Bac. Abr. 563.

But ATKINS and SCROGGS, *Justices*, were of another opinion; they agreed that if an action be brought in an inferior court, if it be not said to be *infra jurisdictionem curiæ*, they would never presume it to be so, but rather to be without, if not alledged to be within the jurisdiction (*c*), and here in the plea it is not shewn at all; so that as the case stands upon the plea, the proceedings are *coram non judice*, and there is no legal authority to warrant them, and by consequence the officer is no more to be excused than the party, because also it is in the case of a particular jurisdiction: and so it hath been adjudged upon an escape brought against an officer of an inferior court, wherein the plaintiff declared that he had brought an action upon a bond against *S.* in the court of *Kingston*, and that he had judgment and execution, and the defendant suffered him to escape; this declaration did not charge the defen-

1. Vent. 88. Lut. 1567. 9. Mod. 95. 10. Mod. 71. 12. Mod. 204. 508. Stra. 255. 567. 786 704. 827. Ld. Ray. 211. 230.

(*a*) 2. Leon. 89. 4. Leon. 78. Stra. 569.

(*b*) Ante, 29.

(*c*) See 1. Term Rep. 151.

 dant,

HIGGINSON *against* MARTIN AND HADLEY.

dant, because the bond was not alledged to be made *infra jurisdictionem curiæ*; for though such an action is transitory in its nature, yet the proceedings in an inferior court upon it are *coram non judice*, if it do not appear to be *infra jurisdictionem*, 1. *Roll. Abr.* 809. though in the case of a general jurisdiction it might be otherwise. But here the rejoinder doth help the plea; for the plaintiff having replied, that the trespass was committed out of the jurisdiction, and the defendant having rejoined, that he had alledged in his declaration below that the trespass was done within the jurisdiction, it is now all one plea, and the plaintiff hath confessed it by his demurrer; so that in regard it was alledged below and admitted there, it is a good plea both for officer and party, and the plaintiff cannot now take advantage of it, but is concluded by his former admittance, and it shall not be enquired now whether true or false (*a*).

Lutw. 935. 1568. Ante, 102.

(*a*) It is said, S. C. 1 Freem. 322. that THE COURT, in Trinity Term 1677, gave judgment without question in favour of *Martin* the officer; but as to *Hadley*, who was plaintiff in the inferior court, judgment was given by NORTH *Chief Justice*, WYNDHAM and ATKINS, *Justices*, against him, for although the officer could not take notice (it being alledged in the declaration to be within the jurisdiction of the court) that it was without, yet the plaintiff himself shall be bound to take notice of it, and though the defendant did not take advantage of it there, yet he shall not be *estopped* to do it here, by admitting a matter in an inferior court in a cause that they had not jurisdiction of.—But SCROGGS, *Justice*, *contra*, because there was a judgment in being; and so long as that continued in force, it should protect those who acted under it till it was reversed by writ of error.—And this opinion of SCROGGS seems confirmed by the opinion of the Court in the case of Rowland *v.* Veale, Hilary Term 14 Geo. 3. Cowp. 20. See Squib *v* Hole, ante, 29. Trevor *v.* Wall, 1. Term Rep. 151. Cooper *v.* Boot, 1. Term Rep. 535.

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Case 117.

Jones's Case.

The court of common pleas may, by the common law, grant a *habeas corpus* to bail a person committed for a *misdemeanor*.

IT was moved for a *habeas corpus* for one *Jones*, who was committed to *New Prison* by warrant from a justice of peace, for refusing to discover who entrusted him with the keeping of the keys of a conventicle, and for that he had been instrumental to the escape of the preacher. He was asked by the justice to give security for his good behaviour, which he also refused, and thereupon was committed.

1. Mod. 235. Post. 3 6. 2. Inst. 55. 615. Vaugh. 157. 2. And. 297. 2. Barnes, 19. 178. 300. 3. Leon. 18. 2. Jones, 13. Carter, 221. 3. Bac. Abr. 2. Bl. Rep. 74. 3. Wils. 172.

THE CHIEF JUSTICE doubted that a *habeas corpus* could not be granted in this case, because it was in *a criminal cause*, of which the court of *common pleas* hath no jurisdiction, and that seemed to be the opinion of my *Lord Coke*, 2. *Inst.* 55. where he saith, it lies for any officer or privileged person of the court. There are three sorts of *habeas corpus* in this court. One is *ad respondendum*, which is for the plaintiff, who is a suitor here against any man in prison, who is to be brought thereupon to the bar, and remanded if he cannot give sureties. There is another *habeas corpus* for the defendant *ad faciendum et recipiendum*; as to this, the same jurisdiction is here as in the court of king's bench; if a person be near the town, by the course of the court, he may be brought

brought hither to be charged (*a*), and then the *habeas corpus* is returnable *immediate*; but if he be remote, it must then be returnable in the court at a certain day: these are the *habeas corpus's* which concern the jurisdiction of this court, and are incident thereunto. There is another which concerns privilege, when the party comes and subjects himself to the Court to be either bailed or discharged, as the crime is for which he stands charged; and if he be privileged, this court may examine the case and do him right; if a private man be committed for a criminal cause, we can examine the matter and send him back again. Before *King James's* reign there was no *habeas corpus* but recited a privilege, as in the case of privilege for an attorney; so that if this court cannot remedy what the party complains, it is in vain for the subject to be put to the trouble when he must be sent back again; neither can there be any failure of justice, because he may apply himself to a proper court. JONES'S CASE.

And of the same opinion were WYNDHAM and SCROGGS.

* But ATKINS, *Justice*, was of another opinion; for he could see no reason why there should not be a right to come to this court as well as to the king's bench; and that VAUGHAN, *Chief Justice*, and WYLDE and ARCHER, *Justices*, were of opinion, that this court may grant a *habeas corpus* in other cases besides those of privilege (*b*). * [199]

Afterwards the prisoner was brought to the court upon this *habeas corpus*, but was remanded, because this court would not take sureties for his good behaviour. *Quære*, If the court of *common pleas* can take sureties for good behaviour?

THE CHIEF JUSTICE said, that when he was not on the bench he would take sureties as a justice of peace: and MONDAY, late Secondary, informed him that WYLDE, *Justice*, when he sat in this court, did once take such sureties as a justice of peace. 2. Hawk. P.C. 177.

(*a*) Stiles Pract. Reg. 330. 1. Mod. 235. 3. Bac. Abr. 2. 1. Salk. 351. 2. Stra. 936. 2. Burr. 1049. Tidd's Practice, 170.

(*b*) By 16. *Car.* 1. c. 10. if any person shall be committed by the privy council, he may apply to the king's bench or *common pleas*, who shall grant him a *habeas corpus*; and by 31. *Car.* 2. c. 2. any of the said courts in Term-time, and any Judge of the said courts, or Baron of the exchequer in the vacation, may award a *habeas corpus* for *any prisoner whatsoever*. And it is decided, that the court of *common pleas* may, by the common law, grant a *habeas corpus* in all cases of *misdemeanor*.—Wood's Case, 3. Wilf. 172. S. C. 2. Bl. Rep 745 See also 2. Hawk. P. C. ch. 15. f. 81. & 82. Wilkes's Case, 2. Wilf. 151.

Anonymous. Case 118.

IT was the opinion of NORTH, *Chief Justice*, that in *a replevin* both parties are *actors*; for the one sues for *damages*, and the other to have *the cattle*. In *replevin* both are *actors*.

In replevin, if the taking be alledged at *A* the defendant may plead *non cepit*, &c. but then he shall have no *return*—1. Bro. Ent. 12. Lut. 1131. 2. Wilf. 354. 5. Com. Dig. "Pleader" (3. K. 12.) 3. Term Rep. 349.

And there *the place* is material; for if the plaintiff alledge the taking at *A.* and they were taken at *B.* the defendant may plead *non cepit modo et formâ*, but then he can have no return; for if he would have a *retorno habendo*, he must deny the taking where the plaintiff hath laid it, and alledge another place in his avowry.

Case 119. Sir Osborn Rands *against* Tripp.

The Court will grant *a new trial* if the Judge who tried the cause is dissatisfied with the verdict. S. C. 3. Salk. 65. Abr. Eq. 377. 2. Vern. 75. 240. 378. 419. 437. 503. 1. Barnes, 316. 320. 424. 2. Barnes 352. 367. 439. 1. Peer. Wms. 212.

THE PLAINTIFF was *a tobacconist*, and lived near *Guildhall, London.* He married the daughter of the defendant, who was an alderman in *Hull*, and had four hundred pounds portion with her. After the marriage the defendant spoke merrily before three witnesses, "That if his son-in-law would procure himself to be "*knighted*, so that his daughter might be *a lady*, he would then "give him two thousand pounds more, and would pay one thousand "pounds, part thereof, presently upon such knighthood, and the "other one thousand pounds within a year after" (it being intended when the plaintiff should by his trade get an estate sufficient to qualify him for the dignity of a knight).

The son-in-law, without acquainting the defendant, did about nine months afterwards, procure himself to be knighted, and brought an *assumpsit* for the two thousand pounds, which was tried before [illegible] North, *Chief Justice*, at G[illegible] and the jury gave

* [200] fift en [illegible]

2. Peer. Wms. 564. Stra. 113. 584. 691 905. 1051. 1105. 1142. Annaly's Rep 23. Andr. 260. 1. Wilf. 22. 329. 3. Wilf. 38. 3 Burr. 1306. 5. Com. Dig. "Pleader" (R. 17.). Cowp. 601.

MAYNARD, [illegible]t, now moved for *a new trial*, upon the affidavit of the defendant that he had found out material witnesses since the trial, and that such witnesses as he had ready at the trial could not get into court, because of the great tumult and disorder there with a multitude of people, by reason whereof his counsel could not be heard from the noise, and when they offered to speak were as often hissed.

THE CHIEF JUSTICE thought it was a hard verdict, for he was not clearly satisfied that the agreement was good, it being only for words which were spoken by the old man when he had but a weak memory.

And thereupon *a new trial* was granted, because the Chief Justice thought it was fit so to be.

Case 120. Basket *against* Basket.

To debt on a bond conditioned to grant an annuity within six months after the death of *A.* and if he refuse on request to pay 300l. and if he fail in payment thereof the bond to be forfeited, the defendant may plead *no grant tendered* within the six months; for the plaintiff, by not making the request in time, hath discharged one part of the condition, and the law will discharge the defendant from the other.—S. C. 1. Mod 264. S. C. 1. Freem 228. Ante, 75. Post. 3[illegible]. 1. Roll. Abr. 447. 455. Poph. 98. Goldsb. 142. Cro. Eliz. 396. 539. T. Jones. 95. 3. Lev. 137. Moor, 654. 1. Saund. 987. Gilb. Eq. Rep. 250. Abr. Eq. 107. 10. Mod. 473. 268. 519. 11. Mod. 48. 12. Mod. 413. 455. 462. 503. 2. Vern. 344. 721. Prec. Ch. 562. 2. Peer. Wms. (617). 3. Peer. Wms. 189. Stra. 459 535. 569. 712. Ld. Ray. 750 911. 2. Com Dig. "Condition" (K. 2.). 3. Com. Dig. "Election" (A.). 1. Bac. Abr. 432. 3. Bac. Abr. 708. 1. Term Rep. 645.

DEBT UPON A BOND with a condition to make an assurance of an annuity of twenty pounds a year to the plaintiff, within six months after the death of *Mary Bassett*; and if he refuse when

requested

requested by the plaintiff, then to pay three hundred pounds; and if he fail in payment thereof, the bond to be forfeited. The defendant pleads [that the plaintiff had not tendered any grant of annuity within the six months after the death of *Mary Basset*. The plaintiff replies], that all the six months he was a prisoner at *Morocco* in *Barbary*, and that after his return he requested the defendant. To this replication the defendant demurred.

BASKET against BASKET.

GEORGE STRODE, *Serjeant*, maintained the demurrer. The question was, Whether the plaintiff, by neglecting to tender a grant of the annuity to the defendant, hath not dispensed with the whole condition? And he held that it was dispensed withal, and that, no request being made, the bond could not be sued at the common law; and therefore the replication was ill. It is not so much a *disjunctive condition* to do one thing or another, but the last clause is *a penalty* to enforce the first; for seeing the annuity is to be but twenty pounds a year for a life, and yet that three hundred pounds is to be paid in case that be not granted, this proves it to be only a penalty, because annuities at the highest value are but at eight years purchase, whereas this is fifteen years purchase, so that the three hundred pounds could never be intended as a * recompence for the annuity; neither could the defendant possibly save the condition, because the same time is limited both for the payment of the three hundred pounds and granting of the annuity, *viz.* within six months; and the plaintiff hath to the utmost time to request the executing the grant, and therefore the other cannot pay the money before *(a)*. But taking the case to be that this is *a disjunctive condition*; yet since conditions are always made in favour of the obligor, the power of election, even in such cases, is left wholly in him *(b)*; but according to such constructions as would be made for the plaintiff, the election is gone from the defendant, and left in the obligee; for if he do not request the annuity, then the three hundred pounds is to be paid, and this is directly against the rules of disjunctive conditions. The case of *Greeningham v. Ewre (c)* is express in point, where the condition of a bond was, that if the obligor delivered to the plaintiff three bonds by such a day, or gave him such a release of them as the plaintiff's counsel should advise, before the said day, that then, &c.; the defendant pleads nothing as to the delivery of the bonds, but saith, that the plaintiff's counsel advised no release: and upon a demurrer this was adjudged for the defendant; because in all obligations with a penalty the election is always in the obligor; and this being a disjunctive condition, each part is likewise in his election; for if the obligee should not tender the release, the other is not bound to deliver the bonds; and if he should tender it, then the obligor may either deliver the bonds or execute the release, which he pleases, 4. *Hen.* 7. *pl.* 4. If a man enter into bond, with condition to marry *Jane* by such a day, and the obligee marry her [201]

(*a*) 1. Saund. 287.
(*b*) Wright *v.* Bull, *post.* 304.
(*c*) Cro. Eliz. 396. 539. 1. Roll. Abr. 447. Poph. 98. Gouldsb. 142.

Basket *againſt* Basket. before the day, the condition is ſaved (*a*); but it is otherwiſe if a ſtranger had married her before that day: the act of God and the act of the obligee, in many caſes, diſpenſe with conditions. As 5. *Co.* 21. b. where a parſon was bound in a bond conditioned to reſign his church to *A.* in conſideration of a certain penſion agreed on, and the parſon refuſed; the Court was of opinion, that he need not reſign till he was ſure of his penſion by deed, which they held ought to be firſt tendered to him. So a man covenants to grant ſuch an eſtate to his wife, or to leave her worth ſo much money if ſhe ſurvive him; if ſhe die before him the condition is not broken, though he did not make ſuch grant. In the caſe of *Warren v. White* (*b*), lately adjudged in the king's bench, where *Warren* was indebted to *Warner*, and *White* became bound with him to pay the money before the 25th day of *Decem-*
[202] *ber* then next following, * but if he did not pay it, that then *Warren* ſhould appear the next *Hilary Term* following to *Warner's* action *Warren* dies after the 25th of *December*, but before the Term; and it was held that the bond was not forfeited, becauſe the obligor had election to do either the one or the other, and the
Moor, 645. performance of the one becoming impoſſible by the act of God, the obligation was ſaved. If the caſe of *Moor v. Moorcomb*, *Cro. Eliz.* 864. ſhould be objected, where the condition of the bond was, that the defendant ſhould deliver to the plaintiff a ſhip before ſuch a Feaſt, or in default thereof pay, at the ſame Feaſt, ſuch a ſum as a third perſon therein named ſhould adjudge, which third perſon appointed no ſum to be paid, and yet there it was adjudged for the plaintiff, that it did not diſpenſe with the whole condition; he agreed this caſe to be law, becauſe there the valuation and worth of the ſhip and the money to be paid was by the appointment of a ſtranger, and the condition being for the benefit of the defendant, he is to procure the ſtranger to make an appointment what ſum ſhould be paid, or to deliver the goods, otherwiſe the bond is forfeited, and he hath expreſsly agreed to do the one or the other. But this is not like the caſe at the bar, where it is not a ſtranger, but the obligee himſelf that muſt procure the conveyance; for it is to be adviſed by his counſel, and to be done at his coſts; and therefore in *Lamb's Caſe* (*c*) it was held, that if a man be bound to give ſuch a releaſe before ſuch a day as the Judge of the admiralty ſhall direct, it is no plea to ſay that he appointed none;
1. Roll. Abr 452. lit. L. placito 6. for the Judge being a ſtranger to the condition, the defendant is to apply himſelf to him, having undertaken to perform it at his peril; which is the ſame reſolution with *Moor's Caſe* in *Croke*. So that he took it for a rule in all caſes, that where the act of God or of the obligee diſcharges the obligor from one part of a disjunctive obligation, the law diſcharges him of the other: and therefore prayed judgment for the defendant. *Dyer*, 361.

1. Com. Dig. 458. Pemberton, *Serjeant*, *contra*. It appears that one thing or the other was to be done in this caſe; for if the plaintiff demanded

(*a*) 1. Roll. Abr. 455.
(*b*) 1. Roll. Abr. 451.
(*c*) 5. Co. 23.

and

and tendered an annuity, the defendant was to seal it; and if he did not tender it, then likewise the defendant was to do something, *viz.* to pay three hundred pounds; so that the plaintiff was either to have the annuity or the money. He agreed, that where the obligor hath the election, in such case if the obligee shall wilfully determine it, the bond is thereby discharged. * But if a stranger take away the election it is no discharge; for in such case the other part is to be performed. In this case the plaintiff hath done no wilful act to determine the defendant's election; but all which is pretended is, that he hath not done something necessary to be performed, which is, that he hath not made a request. But by his omission thereof the defendant's election is not taken away; for though no request was made within the six months, yet the defendant might have prepared a grant of the annuity himself, and have offered it to the plaintiff within the six months, upon the last part of the day; and if he had thus set forth his case, and alledged that the plaintiff made no request, nor tendered him a grant of the annuity to seal, this had been a good performance of the condition, for he had done that which was the substance; which though it was to be done at the plaintiff's charge, yet the defendant might have brought an action for so much money by him paid to the use of the other; and the cases put in the principal case in *Moor*, 645. are expresly for the plaintiff in this case, where the judgment was, that if there be a statute with a defeasance to make such conveyance as the counsel of the conusee shall direct, the cognisor must prepare the conveyance, if the other do not; and there is a case put where a thing was to be done at the costs of the plaintiff, yet the defendant did it at his own charge, which he recovered of the other.

BASKET against BASKET.

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NORTH, *Chief Justice*, and THE WHOLE COURT were of opinion that the plea was good, because the defendant had the benefit of election, and the plaintiff, not making the request within the six months, had dispensed with one part of the condition, and the law hath discharged the defendant of the other part: and they relied upon the case of *Greeningham v. Ewre*, which they held to be good law, and an authority express in the very point. In this case the obligee was to do the first act, *viz.* to make the request. Where the condition is single, *concilium non dedit advisamentum* is a good plea to discharge the defendant: so here the condition is but single as to the defendant; for though it be disjunctive, yet the plaintiff hath taken away the benefit of election from the obligor of doing the one, and therefore he shall be excused from doing the other. The pleading, as alledged by the counsel of the plaintiff, would not have been a good performance of the condition; for if one be bound to convey as the counsel of the other shall * advise, and he makes the conveyance himself, this is not such a deed as was intended by the parties, and so no performance of the condition. But however the defendant need not plead it, for he is not bound so to do. Here if the plaintiff had requested the sealing of such a grant of an annuity, even the defendant had liberty

* [204]

Basket *against* Basket.

liberty either to execute it or to pay the three hundred pounds; and where the election is on the obligor's part, neither the act or neglect of the obligee shall take it away from him; for it would be unreasonable that the obligee should have his choice either to accept of the annuity or the three hundred pounds, when it is known rule, That all conditions, where there is *a penalty* in the bond, are made in favour and for the benefit of the obligor; and the three hundred pounds in this case to be paid upon the refusal of the defendant to make such grant, is in the nature of a penalty to enforce him to do it. The principal case in *Moor*, 645. was agreed to be law; but the rule there put was denied, as not adequate to the present case, which was, That if by the act of God or of the party, or through default of a stranger, it become impossible for the obligor to do one thing in a *disjunctive condition*, he is, notwithstanding, bound to do the other. This is true only as to the last case, but not to the two first; and for an authority *Laughter's Case (a)* was full in point, which is, that when a condition consists of two parts in the disjunctive, and both are possible at the time of the bond made, and afterwards one becomes impossible by the act of God or of the party, the obligor is not bound to perform the other part.

Ld. Ray. 1140.

And judgment was given for the defendant.

(*a*) 5. Co. 21.

Case 121. Smith *against* Tracy.

Distribution shall be equally made amongst the children of *the whole* and *half blood*.

S. C. 1. Mod. 209. S. C. 2 Jones, 93. S. C. 1. Vent. 307. 316. 323

PROHIBITION.—The case was, A man dies intestate, having three brothers of the whole blood, and a brother and sister of the half blood.

The question was, Whether they shall be admitted to a distribution in an equal degree?

Mr. Holt argued, that they were all *in æquali gradu*, because before the act of distribution the ordinary had power to compel the administrator to give and allot filial portions to the children of the deceased out of his estate. And by the civil law such provision is made for the children of the intestate that the goods which

* [205]

either the father or mother brought to each other at * the marriage, shall not remain to the survivor, but the use and occupation of them only during life; for the property did belong to the children. By the statute of 21. *Hen.* 8. c. 5. the ordinary is to grant administration to the widow of the intestate, or to the next of his kin, or to both, as by his discretion he shall think good; and in case where divers persons claim the administration as next of kin which

S. C. 1. Eq. Ab. 249. S. C. 2. Lev. 273. S. C. 2. Vent. 317. S. C. 3 Keb. 601. 620. 669. 730. 776. 806. 831. S. C. 1. Freem. 288. 294. 1. Vern. 403. 437. Carth. 51. 2. Vern. 5c. 106. 124. Abr. Eq. 248. Fitzg. 126. 286. 10. Mod. 442. Gilb. Eq. Rep. 189. 12. Mod. 409. 566. 6[illegible]. Comyns, 3. 87. Prec. Chan. 21. 28. 54. 169. 401. 527. 593. Cases Temp. Talb. 251. 276. 351. 1. Peer. Wms. 25. 41. 48. 50. 53. 594. 2. Peer. Wms. 344. 356. 358. 440. 3. Peer. Wms. 40. 50. 102. 125. 194. Stra. 455. 865. 710. 820. 935. 947. Ld. Ray. 86. 96. 363. 571. 2. Bac. Abr. 429.

be

be in equal degree, the ordinary may commit adminiſtration to which he pleaſeth; and his power was not abridged, but rather revived by this late act 22. & 23. *Car.* 2. c. 10. by which it is enacted, "that juſt and equal diſtribution ſhall be made amongſt "wife and children, or next of kin in equal degree, or legally re- "preſenting their ſtocks *pro ſuo cuique jure*;" and the children of the half blood do, in the civil law, legally repreſent the father, and to ſome purpoſes are eſteemed before the uncles of the whole blood. It is no objection to ſay, that becauſe the law rejects the half blood as to inheritances, therefore it will do the ſame as to perſonal eſtates, becauſe ſuch eſtates are not to be determined by the common but by the canon or civil law; and if ſo, the half blood ſhall come in for diſtribution, for this act of parliament confirms that law.

SMITH *againſt* TRACY.

WINNINGTON, *Solicitor General*, *contra*. He agreed that before this act the half blood was to have equal ſhare of the inteſtate's eſtate; but that now the ordinary was compelled to make ſuch diſtribution, and to ſuch perſons, as by the act is directed; for he had not an original power to grant adminiſtration in any caſe that did belong to the temporal courts, but it was given to him by the indulgence of princes, not *quatenus* a ſpiritual perſon, *Henſloe's Caſe*, 9. *Co. Bendl.* 133. *Sid.* 370. And if he had not power in any caſe, he could not grant to whom he pleaſed. But admitting he could, his power is now abridged by this ſtatute, and he cannot grant but to the wife and children or next of kin in equal degree or legally repreſenting their ſtocks. Now ſuch legal repreſentation muſt be according to the rules of the common and not of the civil law; for if there be two lawful brothers and a baſtard *eigne*, and a queſtion ſhould ariſe concerning the diſtribution of an inteſtate's eſtate, the ſubſequent marriage according to the law in the ſpiritual court would make the latter legitimate, and if ſo a legal repreſentative amongſt them; but this Court will never allow him ſo to be.

* But THE COURT were all of opinion, that in reſpect of the father the half blood is as near as thoſe of the whole, and therefore they are all alike, and ſhall have an equal diſtribution; and that ſuch conſtruction ſhould be made of the ſtatute as would be moſt agreeable to the will of the dead perſon, if he had deviſed his eſtate by will; and it was not to be imagined, if ſuch will had been made, but ſomething would have been given to the children of the half blood. * [206]

And thereupon a *conſultation* was granted (*a*).

(*a*) In the caſe of Earl Winchelſea *v.* Norcliff, Trinity Term, 2. Jac. 2. 1. Vern. 403. the court of chancery was of opinion, that where there is a brother of the whole blood to the inteſtate, and a ſiſter of the half blood, the ſiſter ſhould have but half a ſhare. But ſince the above deciſion of Smith *v.* Tracy, and the caſe of Stapleton *v.* Sherrard, the conſtant practice of the Court has been otherwiſe; and it has been ſince ſettled in the caſe of Crooke *v.* Watts, upon appeal to the houſe of lords, that the half blood ſhould have a whole ſhare equal with thoſe of the whole blood. 1. Vern. 404. 437.

EASTER

EASTER TERM,

The Twenty-Ninth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*

Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.* } *Justices.*
Sir William Scroggs, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Anonymous. Case 122.

Judgment given on *a plaint* in the county court for more than *forty shillings* shall be reversed.

FAUX JUDGMENT.—TURNER, *Serjeant*, took this exception, That the plaintiff in the court below had declared *ad damnum* twenty pounds, whereas it not being a court of record, and being *sine brevi*, the court could not hold plea of any sum above forty shillings.—And for this cause the judgment was reversed.

2. Inst. 312. 4. Inst. 266. 1. Vent. 65. 73. Palm. 564.

* [207]

* Southcot *against* Stowel. Case 123.

Hilary Term, 25. & 26. *Car.* 2. *Roll* 1303.

A. having two sons, *B.* and *C.* and being seised of lands in fee, COVENANTS, in consideration of marriage, *to stand seised* to the use of *A.* and the heirs male of his body; and for want of such issue to his own heirs male, with remainder to his own right heirs in fee. *B.* hath issue one son *D.* and five daughters, and dies in the life-time of his father. The estate in tail on the death of *A.* vests in *D.* by purchase, and on the death of *D.* without issue goes by discent to his uncle *C. per formam doni*, as heir male of *A.*—S. C. 1. Mod. 226. 237. S. C. 3. Keb. 704. S. C. 1. Freem. 216. 225. Ante, 16. Vaugh. 49. Prec. Chan. 54. 342. 438. 338. 442. 461. Hob. 30. 1. Mod. 159. 8. Mod. 23. 9. Mod. 162. 170. 176. 10. Mod. 416. 421. 424. 436. 11. Mod. 61. 96. 119. 152. 181. 210. 12. Mod. 32. 38. 401. 160. Gilb. Eq. Rep. 20. 1. Vern. 22. 40. 141. 198. 415. 2. Vern. 60. 449. 546. 572. 723. 1. Peer. Wms. 54. 59. 171. 333. 472. 622. 754. 2. Peer. Wms. 139. 3. Peer. Wms. 259. Fitzg. 301. Cases Temp. Talb. 17. 22. 25. Stra. 17. 35. 584. 729. 802. 849. 934. 1125. Ld. Ray. 160. 290. 779. 799. 876. 781. 855. 3. Com. Dig. 58. 4. Bac. Abr. 311, 312. 5. Bac. Abr. 367. Dougl. 501. Fearn. Con. Rem. 53. 109.

SPECIAL VERDICT IN EJECTMENT.—The case was, *Thomas Southcot* having issue two sons, *Sir Popham* and *William*, and being seised in fee of a farm called *Indyo* (the lands now in question),

SOUTHCOT *against* STOWEL.

tion), did upon the marriage of his eldest son *Sir Popham*, covenant to stand seised of the said farm to the use of the said *Sir Popham Southcot*, and the heirs males of his body on *Margaret* his wife to be begotten; and for want of such issue, to the heirs males of the covenantor; and for want of such issue, to his own right heirs for ever. *Sir Popham* had issue begotten on his wife *Margaret Edward* his son, and five daughters, and dies. *Thomas* the covenantor dies. *Edward* dies without issue.

And, Whether the five daughters as heirs general of *Thomas*, or *William* their uncle as special heir male of *Thomas per formam doni*, shall inherit this land? was the question.

Two objections were made against the title of *William* the uncle.

FIRST, Because here is no express estate to *Thomas* the covenantor; for it is limited to his heirs males, the remainder to his own right heirs; so that he having no estate for life, the estate tail could not be executed in him, and for that reason *William* cannot take by *descent*.

SECONDLY, He cannot take by *purchase*, for he is to be heir of *Thomas* and heir male; the limitation is so; but he cannot be heir, for his five nieces are heirs.

[208] * In answer to which, these assertions were laid down.

FIRST, That in this case *Thomas* the covenantor hath an estate for life by implication, and so the estate tail, being executed in him, comes to *William* by descent and not by purchase; for though the covenantor had departed with his whole estate, and limited no use to himself, yet he hath a reversion, because he can have no right heir while he is living; and therefore the statute of 27. *Hen.* 8. c. 10. creates an use in him till the future use cometh *in esse*, and by consequence the right heirs cannot take by purchase; for wherever the heir takes by purchase, the ancestor must depart with his whole fee, for which reason a fee cannot be raised by way of purchase to a man's right heirs by the name of heirs, either by conveyance of land, or by use, or devise, but it works by descent (*a*). And that uses may arise by implication by covenants to stand seised, the authorities are very plentiful (*b*). In the case of *Hodgkinson v. Wood* (*c*) in a devise, there was the same limitation as this: the case was, *Thomas* being seised in fee had issue *Francis* and *William* by several venters, and devised land to *Francis* his eldest son for life; then to the heirs males of his body; and for default of such issue, to the heirs males of *William*, and the heirs males of their bodies for ever; and for default of such issue to the use of the right heirs of the devisor; then he made a lease to *William* for thirty years, to commence after his death, and

Hob. 30.

(*a*) Co. Lit. 22. b.

(*b*) Moor, 284. 1. Co. 154. Lord Paget's Case, cited in the Rector of Cheddington's Case, Cro. Eliz. 321. 1. Roll. Rep. 239, 240. 317. 348. Lane *v* Pannel.

(*c*) Cro. Car. 23.

dies;

dies: *William* enters and surrenders this lease to *Francis*, who enters and makes a lease to the defendant, and dies without issue; and *William* enters and makes a lease to the plaintiff: it was adjudged for *William*, because he, being heir male of the body of the devisor, had by this limitation an estate tail, as by purchase; and that the inheritance in fee simple did not vest in *Francis*.

SOUTHCOT *against* STOWEL.

SECONDLY, If *Thomas* the covenantor had no estate executed in him, yet *William* his son in this case may take by way of future springing use; because the limitation of an estate upon *a covenant to stand seised*, may be made to commence after the ancestor's death, for the whole seisin of the covenantor is enough to support it. There is a great difference between *a feoffment to uses*, and *a covenant to stand seised*; for by the feoffment the estate is executed presently (*a*). So if there be a feoffment to *A.* for life, remainder to *B.* in * fee; if *A.* refuse, *B.* shall enter presently, because the feoffor parted with his whole estate; but if this had been in the case of a covenant to stand seised, if *A.* had refused, the covenantor should have enjoyed it again till after the death of *A.* by way of springing use; like the case of *Parsons v. Willis* (*b*), where a man covenants with *B.* that if he doth not marry, he will stand seised to the use of *B.* and his heirs; *B.* dies; the covenantor doth not marry; the use arises as well to the heir of *B* as to *B.* himself, if he had been living, and he shall have the land in nature of a descent. [209]

But if *William* cannot take it either by purchase or by descent, he shall take it *per formam doni* as special heir to *Thomas*: this case was compared to that in *Littleton* (*c*); if lands are given to a man, and the heirs females of his body, if there be a son, the daughter is not heir, but yet she shall take it; for *voluntas donatoris*, &c. So if lands be given to a man, and the heirs males of his body, the youngest son shall have it after the death of the eldest, leaving issue only daughters, for these are descents *secundum formam doni*. So in this case the estate tail vested in *Edward*, and when he died without issue, it comes to *William per formam doni*. The *Case of Greswold* (*d*) may seem to be express against this opinion; which was, That *Greswold* was seised in fee and made a grant for life, the remainder to the heirs males of his body, the remainder to his own right heirs; he had issue two sons, and died; the eldest son had issue a daughter, and died; and, If the daughter or her uncle should have the land? was the question in that case: and it was adjudged that the limitation of the remainder was void, because *Greswold* could not make his right heir a purchasor without departing with the whole fee, and therefore judgment was given, against the special heir in tail, for the heir general, which was the daughter. But admit that case to be law (yet the Judges there differed in their arguments), it is not like this at bar; for that

See the case of Brittain *v.* Charnock, post. page 286.

(*a*) 1. Co. 154. Rector of Chedding-ton's Case.
(*b*) 2. Roll. Abr. 794.
(*c*) Lit. s. 23.
(*d*) 4. & 5. *Phil.* & *Mary*, Dyer, 156.

case

SOUTHCOT *against* STOWEL. case was not upon a *covenant to stand seised*; but upon a deed indented, and so a conveyance at the common law; but for an authority in the point, the case of *Pybus v. Mitford* was cited and relied on,
Mod. Rep. 159. which was *Trin.* 24. *Car.* 2. *Rot.* 703. adjudged by HALES, *Chief*
1. Ventris, 372. *Justice*, RAINSFORD and WYLDE, *Justices*; but JUSTICE TWISDEN was of a contrary opinion.

[210] * STROUD, *Serjeant*, who argued *on the other side*, made three points.—FIRST, Whether this limitation be good in its creation? —SECONDLY, If the estate tail be well executed in *Thomas* the covenantor?—THIRDLY, If it be good and well executed, whether, when *Edward* died without issue, the whole estate tail was not spent?

9. Mod. 161. 10. Mod. 184. 360. 369. 377. 2. Vern. 409. 729. Ld. Ray. 854. And as to THE FIRST POINT, he held that this limitation to the heirs males of *Thomas* was void in the creation; because a man cannot make himself or his own right heir a purchasor, unless he will part with the whole estate in fee (*a*). If *A.* being seised in fee make a lease for life to *B.* the remainder to himself for years, this remainder is void; so if it had been to himself for life, because he hath an estate in fee, and he cannot reserve to himself a lesser estate than he had before (*b*). If I give land to *A.* for life, the remainder to myself for life, the remainder in fee to *B.* after the death of *A.*; in this case *B.* shall enter, for the remainder to me was void (*c*). It is true, these cases are put at the common law, but the statute of Uses makes no alteration; for, according to the rules laid down in *Chudleigh's Case* (*d*) by my lord Chief Justice POPHAM, uses are odious, and so the law will not favour them. SECONDLY, A rule at common law shall not be broke to vest an use, and the uses here cannot vest without breaking of a rule in law. THIRDLY, Uses are raised so privately, that he who takes them may not know when they vest, and for that reason they are not to be favoured. FOURTHLY, The statute annexes both the possession and the use together, as they vest and divest both together (*e*).

As to THE SECOND POINT, the estate is not executed in *Thomas*, and therefore *William* cannot take it by descent. "Heirs of his body" or "heirs male" are good words of limitation to take purchase from a stranger, but not from an ancestor, for there he shall take by descent; and for this there is an authority, *Co. Lit.* 26. b. *John* had issue by his wife *Roberga*, *Robert* and *Maud*; *John* dies; *Michael* gave lands to *Roberga*, and to the heirs of
[211] her husband on her body begotten; * *Roberga* in this case had but an estate for life; for the fee tail vested in *Robert*, and when he died without issue his sister *Maud* was tenant in tail *per formam doni*; and in a *formedon* she counted as heir to *Robert*, which she was not, neither was she heir to her father at the time of the gift; yet it was

(*a*) Dyer, 309. b.
(*b*) 42. Assize, 2.
(*c*) The Year-Books *Hen.* 5. pl. 8. 42. *Edw.* 3. pl. 5. Brook's Abr. "Estate," 66. Dyer, 69. b.
(*d*) 1. Co. 138.
(*e*) Moor, 284. 713. 2. Co. 91; Co. Lit. 22.

held

held good; for the words, *viz.* "heirs of the body of the father," were words of purchase in this case. If therefore no use for life vested in *Thomas*, then *William* cannot take by descent. *Dyer*, 156. *Co. Lit.* 22. *Hob.* 31. *Dyer*, 309. 1. *Co.* 154. *Lord Paget's Case*, cited in *Hob.* 151.

SOUTHCOT *against* STOWEL.

TO THE THIRD POINT, admitting both the former to be against him, yet since *Edward* is dead without issue, the estate tail is spent.

But THE WHOLE COURT were of opinion, That *William* should inherit this land in question; for though, at the common law, a man cannot be donor and donee, without he part with the whole estate, yet it is otherwise upon a covenant to stand seised to uses: and if any other construction should be made, many settlements would be shaken, in which nothing was more usual now than to covenant to stand seised to the use of himself and the heirs males of his body, &c.

THEY ALL AGREED ALSO, That the estate being well limited, *William* should take *per formam doni* as special heir; for *voluntas donatoris in chartâ manifestè expressâ observetur*; and it is apparent *Thomas* intended that *William* should have it, or else the limitation to his heirs males had been needless. So that, taking it for granted that the estate-tail once vested, it is not spent by his dying without issue, but it comes to *William* by descent, and not as a purchasor; for so he could not take it, because he is not heir, and till *Thomas* be dead without issue the tail cannot be spent; so there was no difficulty in that point.

And they held the opinions of DYER and SAUNDERS, who were divided from the other Justices, in *Creswold's Case*, to be good law; but they doubted of the case of *Pybus v. Mitford*, whether it was law or not. They doubted also, whether by any construction *Thomas* could be said to have an estate for life by implication. They doubted also of the springing use. But they held, that this limitation was good in its creation.—And judgment was given accordingly.

*[212]

* Cockram, Executor, *against* Welby.

Case 124.

IN DEBT, the plaintiff declared that his testator recovered a judgment in this court, upon which he sued out a *fieri facias*, which he delivered to the defendant, being sheriff of *Lincoln*; and thereupon the said sheriff returned *fieri feci*, but that he hath not paid the money to the plaintiff, *per quod actio accrevit*, &c. The defendant pleaded the statute of Limitations. To which the plaintiff demurred.

To an action of *debt*, brought by an *executor* against *a sheriff* to recover money levied on a *fieri facias* under an execution sued out by *the testator*, the defendant cannot plead the statute of *limitations*.

THE QUESTION was, Whether this action was barely grounded on *the contract*, or whether it had a foundation upon matter of *record*? If on *the contract* only, then the statute of 21. *Jac.* 1. c. 16. is a good plea to bar the plaintiff of his action, which enacts, "that all actions of debt grounded upon any lending or con- "tract

S. C. 1. Mod. 245. S. C. 2. Show. 79. S. C. 1. Freem. 236. Cro. Car. 237. 5. Mod. 308. 8 Mod. 171. Carth. 153. Ld. Ray. 838. 880. 883. 1430. 1441. 5. Com. Dig. "Temps" (G. 6.). 3. Bac. Abr. 509. Gilb. Ev. 177.

COCKRAM *against* WILBY.

" tract without fpecialty, fhall be brought within fix years next " after the caufe of action doth accrue;" and in this cafe nine years had paffed. But if it be grounded upon *matter of record*, that is a fpecialty, and then the ftatute is no bar.

BARREL, *Serjeant*, held this to be a debt upon a contract without fpecialty; for when the fheriff had levied the money, the action ceafes againft the party, and then the law creates a contract, and makes him debtor, as it is in the cafe of a tally delivered to a cuftomer. It lies againft an executor, where the action arifes *quafi ex contractû*, which it would not do if it did not arife *ex maleficio*, as in the cafe of *a devaftavit*. It is true, the judgment recovered by the teftator is now fet forth by the plaintiff's executor; but that is not the ground but only an inducement to the action, for the plaintiff could not have pleaded "*nul tiel re-* "*cord*;" fo that it is the mere receiving the money which charges the defendant, and not *virtute officii* upon a falfe return; for upon the receipt of the money he is become debtor, whether the writ be returned or not, and the law immediately creates a contract; and contracts in law are as much within the ftatute, as actual contracts made between the parties.

*[213] See 3. Lev. 367. Carth. 144.

* All this was admitted on the other fide; but it was faid, that this contract in law was chiefly grounded upon *the record*; and compared it to the cafe of attornies fees, which hath been adjudged not to be within the ftatute, though it be *quafi ex contractû*, becaufe it depends upon matter of record. 1. *Roll. Abr.* 598. *pl.* 17.

And afterwards in *Michaelmas Term* following, by the opinion of NORTH, *Chief Juftice*, WYNDHAM and ATKINS, *Juftices*, it was held, that this cafe was not within the ftatute, becaufe the action was brought againft the defendant as an officer who acted by virtue of an execution, in which cafe the law did create no contract; and that here was a wrong done, for which the plaintiff had taken a proper remedy, and therefore fhould not be barred by this ftatute.

SCROGGS, *Juftice*, was of a contrary opinion; for he faid, if another received money to his ufe due upon bond, the *receipt* makes the party fubject to the action, and fo is within the ftatute.

But by the opinions of the other Juftices judgment was given for the plaintiff.

EASTER TERM,

The Twenty-Ninth of Charles the Second,

IN

The King's Bench.

Sir Richard Rainsford, *Knt. Chief Juſtice.*

Sir Thomas Twiſden, *Knt.*
Sir William Wylde, *Bart.* } *Juſtices.*
Sir Thomas Jones, *Knt.*

Sir William Jones, *Knt. Attorney General.*

Sir Francis Winnington, *Knt. Solicitor General.*

Major *againſt* Grigg.

Caſe 125.

In *aſſumpſit* on a promiſe to ſave the plaintiff harmleſs in the *poſſeſſion* of a houſe, in conſideration of his paying ſo much a year, an allegation that ſuch a perſon ſued him and received judgment, is ſufficient, *after verdict*, although it is not ſtated that the diſturber had *title*.

THE PLAINTIFF brought an action, For that the defendant *non indemnem conſervavit ipſum de et concernente occupation. quorundam clauſorum, &c. ſecundum formam agreamenti*; and ſets forth a diſturbance by one who commenced a ſuit againſt him in ſuch a Term *concernente occupation. clauſorum præd.* but doth not ſet forth that the perſon ſuing had any *title*.

It was ſaid, that this ought to have been ſhewn: as if a man make a leaſe for years, and covenant for quiet enjoyment; in an action brought by the leſſee upon that covenant, it muſt be ſhewn that there was a lawful title in the perſon who diſturbed, or elſe the action will not lie.

But this being *after verdict*, and the plaintiff ſetting forth in his declaration, that the diſturber recovered *per judicium Curiæ*, THE COURT now were all of opinion, that judgment ſhould be given for the plaintiff (*a*).

S. C. 2. Lev. 194. S. C. 3. Keb. 744. 755. S. C. 2. Danv. 50. Cro. Eliz. 914. Cro. Jac. 315. 425. Vaugh. 120. 2. Saund. 178. 1. Mod. 66. 8. Mod. 318. 10. Mod. 145. 184. 210. 229. 300. 384. 11. Mod. 273. 12. Mod. 510. Comyns, 230. Stra. 400. 514. 681. 873. 973. 1006. 1011. Ld. Ray. 669. 1. Term Rep. 671. 3. Term Rep. 643. 766.

(*a*) See the caſes of Fort *v.* Vine, 2. Roll. Rep. 21.; Wootton *v.* Heale, 1. Mod. 294.; Skinner *v.* Killys, 1. Show. 70.; Proctor *v.* Newton, 2. Lev. 37.; and Foſter *v.* Peirſon, 4. Term Rep. 617.

Case 126. * Taylor *against* Baker.

To an action of debt on a judgment, the defendant cannot plead that he was committed in execution on this judgment, at the suit of the plaintiff, to THE MARSHAL of the king's bench, and that not being able to find the plaintiff he had paid the money to the marshal in satisfaction of the judgment.

S. C. 2. Jones, 97.
S. C. 2. Lev. 203.
S. C. 1. Freem. 453.
S. C. 3. Keb. 748. 788. 802.
1. Leon. 141.
Cro Eliz. 390.
Cro Car. 373.
12. Mod. 230.
2. Show. 172.
Ld. Ray. 399.
Salk. 223.
2. Bac. Abr. 355, 356.
2. Term Rep. 5.

THE CASE WAS THUS:—A man being in execution doth actually pay the money to THE MARSHAL for which he was imprisoned; and thereupon was discharged.

The question was, Whether he should pay it again to the plaintiff upon a second execution?

SAUNDERS argued, that he should not pay it again. He said, this case was never adjudged, and therefore he could produce no authority in point to warrant his opinion, but parallel cases there were many. As if the sheriff take goods in execution by virtue of a *fieri facias*, whether he sell them or not, yet being taken from the party against whom the execution was sued, he shall plead that taking in discharge of himself, and shall not be liable to a second execution, though the sheriff hath not returned the writ; and the reason is, because the defendant cannot avoid the execution; and he would therefore be in a very bad condition, if he were to be charged the second time. And if the sheriff should die after the goods are taken in execution, his executors are liable to the plaintiff to satisfy the debt, for they have paid *pro quo*, and it is in nature of a contract raised by law. By the words of the *capias ad satisfaciendum* it doth appear, that the design of that writ is to enforce the payment of the debt by the imprisonment of the defendant. The sheriff thereupon returns, that he hath taken the body, and that the defendant hath paid the money to him, for which reason he discharged him; and for this return he was amerced, not because he discharged the party, but because he had not brought the money into the court; for the law never intended that a man should be kept in prison after he had paid the debt. In this case the defendant can have no remedy to recover it again of the marshal, because it was not a bare payment to him, but to pay it over again to the plaintiff, and likewise in consideration that he should be discharged from his imprisonment. If it should be objected by the marshal that the plaintiff hath an action of escape against him, and likewise by the plaintiff that he did not make the gaoler his steward or bailiff to receive his money, [215] * I answer, the gaoler is made his bailiff to keep the party in execution; and it would be very hard, that when the prisoner will lay down his money in discharge of the debt, the gaoler should not have full power to discharge him. If he had come in *Michaelmas Term* after the long Vacation, and informed the Court that he had offered to pay the execution-money to THE MARSHAL, and that he would not take it, and that the plaintiff could not be found, the Court would have made a rule to help him.

MR. HOLT *contra*. If the payment had been good to the sheriff or marshal, yet it is not pleadable to the second execution, because it is matter in fact. That which has been objected, *viz.* that the party shall plead, to a second execution, that his goods

were taken by a former *fieri facias*, cannot be; for no such plea can be good, because by that writ the sheriff hath express authority to levy the money; and the plea is not payment to the sheriff, but that the money was levied by him by virtue of the writ, which ought to be brought into the court; and an *audita querela* lies against the plaintiff, and then the defendant is to be bailed. 1. *Leon.* 141. *Askew v. the Earl of Lincoln.* TAYLOR *against* BAKER.

JONES, *Justice*, and RAINSFORD, *Chief Justice*, were of opinion, that the defendant might have remedy against the marshal to recover his money again, and that the payment to him was no discharge to the plaintiff at whose suit he was in execution.

But WYLDE, *Justice*, was of another opinion. *Quære.*

EASTER TERM,

The Twenty-Ninth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*

Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.* } *Justices.*
Sir William Scroggs, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

The Lord Marquis of Dorchester's Case. Case 127.

PEMBERTON, *Serjeant*, in an action of *scandalum magnatum*, moved to have good bail; which THE COURT denied, and said, that in such case bail was not requirable. But, notwithstanding, the defendant consented to put in fifty pounds bail.

No special bail in an action of *scan. mag.*
1. Sid. 183. 276.
3. Mod. 41.

1. Lev. 39. 1. Com. Dig. "Bail" (K. 4.).

AND then, upon the usual affidavit, it was moved to change *the venue*, the action being laid in *London*; which was opposed by THE SERJEANT, who desired that it might be tried where it was laid; but he said, in this case, that *the venue* could not be changed. —FIRST, * Because the king is a party to the suit, for it is *tam pro domino rege quàm pro seipso.*—SECONDLY, The plaintiff is a lord of parliament, which is adjourned and will meet, and therefore it would be inconvenient to try the cause in the country, since the service of the king and kingdom both require his attendance here; and he said, that upon the like motion in the king's bench, between the *Lord Stamford and Needham*, the Court would not change *the venue.*

The Court will not change the *venue* in an action of *scandalum magnatum.*
* [216]
1. Lev. 56.
1. Vent. 4. 363.
T. Jones, 192.
Hob. 37.
11. Mod. 9. 49.
12. Mod. 101. 401. 420.

1. Barnes, 343. Stra. 807. Ld. Ray. 954. 4. Burr. 2447. 1. Com. Dig. "Action" (N. 13.). Gilb. C. P. 90. 4. Bac. Abr. 408, 409.

THE LORD MARQUIS OF DORCHESTER'S CASE.

1. Vent. 363. 4. T. Jones, 192. contra.

NORTH, *Chief Justice*, said, that he always took it as a current opinion, that in a *scandalum magnatum* the *venue* could not be changed; for since it was in the nature of an information, it being *tam quam*, it was advisable whether it was not within the statute of 21. *Jac.* 1. c. 4. which doth appoint informations to be tried in their proper counties.

ATKINS, *Justice*, inclined that *the venue* might be changed, for though by the wisdom of the law a jury of the neighbourhood are to try the cause, yet in point of justice the Court may change *the venue*. To this it was objected, that then there would be no difference between *local* and *transitory* actions. Actions of debt and account shall be brought in their proper counties by the 6. *Rich.* 2. c. 2. and it was agreed that an attorney is sworn to bring actions no where else.

But, THE COURT not agreeing, at last the defendant was willing that the cause should be tried in *London*, if the plaintiff would consent not to try it before the first sitting in the next Term (*a*).

ATKINS, *Justice*, as to that reason offered why *the venue* should not be changed because the plaintiff was a lord of parliament, said, that that did not satisfy him; it might be a good ground to move for a trial at the bar. To this it was answered, that in the case of the *Earl of Shaftsbury* the Court would not grant a trial at the bar without the consent of the defendant.

The *venue* was not changed (*b*).

(*a*) Lord Chief Baron Gilbert says, the Court will never change *the venue* in an action on this statute, because a scandal raised of a peer of the realm reflects on him through the whole kingdom, and he is a person of so great notoriety, that there is no necessity of his being tied down to try his cause among the neighbourhood. Gilb. C. P. 90. It was refused to be changed in the cases of the *Duke of Norfolk*, 2. Salk. 668.; of *Lord Stamford*, 1. Lev. 56.; of *Lord Sandwich*, in Easter Term 1773, 1. Bac. Abr. 36. But in the case of the *Earl of Shaftsbury*, 1. Vent. 364. the *venue* was changed from *London*, on account of the great influence his lordship had in the city. 2. Jones, 192.—But see Pinkney *v.* Collins, 1. Term Rep. 571. and Clifford *v.* Clifford, 1. Term Rep. 647. that the *venue*, in an action for *a libel*, cannot be changed. But see Freeman *v.* Norris, 3. Term Rep. 306. and Metcalf *v.* Markham, 3. Term Rep. 652. *contra*.

(*b*) *Sed vide* 1. Sid. 185.

* [217]

Case 128.

* Beaver *against* Lane.

On a covenant made to husband and wife, the husband alone may bring the action.

S. C. Jones, 367. Lit. 13. Cro. Car. 438. 1. Jones, 3[illegible]. Moor, 912. 1. Vern. 396.

COVENANT MADE TO HUSBAND AND WIFE.—The husband alone brings the action, *quòd teneat ei conventionem secundum formam et effectum cujusdam indenturæ inter querentem ex unâ parte et defendentem ex alterâ parte confect.*; and this was for not repairing his house.

After verdict for the plaintiff, it was moved in arrest of judgment because of this *variance*.

But THE COURT ordered, that the plaintiff should have his judgment; for the indenture being by husband and wife, it was

11. Mod. 169. 177. 264. 12. Mod. 207. 346. 1. Peer. Wms. 378. 458. 461. 2. Peer. Wms. 497. Stra. 229. 726. 977. Ld. Ray. 224. 1. Com. Dig. 574. 1. Bac. Abr. 305. Dougl. 329.

therefore

therefore true that it was by the husband; and the action being brought upon a covenant concerning his houses, and going with them, though it be made to him and his wife, yet he may refuse *quoad* her, and bring the action alone. BEAVER *against* LANE.

And THE CHIEF JUSTICE said, that he remembered an authority in an old book, that if a bond be given to husband and wife, the husband shall bring the action alone, which shall be looked upon to be his refusal as to her.

Calthrop *against* Phillips. Case 129.

An action on the case for negligencies against an ex-sheriff for omitting to deliver to the new sheriff a writ of *supersedeas*, by reason of which the plaintiff was taken in execution.

THE question was, in regard a *supersedeas* is not returnable in the court, Whether the old sheriff is bound to deliver it over to the new one or no?

It was urged that it ought not, because the old sheriff is to keep it for his indemnity, and he may have occasion to plead it.

But GEORGE STRODE, *Serjeant*, on the other side insisted, that it ought to be delivered to the new sheriff, and that there was a writ in *the Register (a)* which proved it, and if it should be otherwise these inconveniences would follow.—FIRST, It would be inconvenient that the *capias* against the defendant should be delivered to the new sheriff, and not the *supersedeas*, which was to admit the charge, and not the discharge, *Westby's Case*, 3. *Co.* 73.; and it was the constant practice not only to deliver the *supersedeas*, but the very book in which it is allowed; and this, he said, appeared by the certificates of many under-sheriffs, which he had in his hand.—SECONDLY, If the sheriff hath an *exigent* against *B.* who appears and brings a *supersedeas* to the old sheriff, and then a new sheriff is made, if he hath not the *supersedeas* he may return him outlawed by virtue of the *exigent*; so in the case of a judgment set aside for fraud or practice, and a *supersedeas* granted; and the like in the * case of an *estrepement*, which is never returned; and it would be an endless work upon the coming-in of every sheriff to renew this writ. As to the objection, that the old sheriff may have occasion to plead it as often as such occasion happens he may have recourse to it in the office of the new sheriff; and he can have no title to it by the direction of the writ, for that is *vicecomiti Berks.* and not to him by express christian and sirname.

S. C. 1. Mod. 222. 1. Roll. Abr. 93. 105. 2. Vent. 26. Ray. 226. 1. Lev. 64. Dyer. 355. Cro. Eliz. 440. 1. Salk. 18. Latch. 187. Ld. Ray. 1073. Dougl. 463. 2. Term Rep. 1.

* [218]

And of that opinion was ALL THE COURT; and judgment was given accordingly *nisi causa*, &c. (b)

(a) Reg. 295.

(b) By 20. *Geo.* 2. c. 37. all sheriffs shall, at the expiration of their office, turn over to the succeeding sheriff, by indenture and schedule, all such writs and process as shall remain in their hands unexecuted, who shall duly execute and return the same, &c.

Hamond

Case 130. Hamond *against* Howell, Recorder of London.

An action will not lie against A JUDGE for what he doth *judicially*, though erroneously.

S. C. 1. Mod. 119. 184. 12. Co. 24. Moor, 6. 1. Roll. Abr. 92. Bridg. 131. Vaugh. 146. T. Jones, 14. Lutw. 1561. Cro. Eliz. 130. 12. Mod 388. 392. 493. 566. Ld. Ray. 454. 468. 941. 1. Com. Dig. 158. Salk. 396. 3. Bl. Com. 24. 2. Bl. Rep. 1145. Cowp. 172.

FALSE IMPRISONMENT.—The defendant pleads specially. The substance of which was, That there was a commission of *oyer and terminer* directed to him amongst others, &c. and that before him and the other commissioners *Mr. Penn* and *Mr. Mead*, two preachers, were indicted for being at a conventicle; to which indictment they pleaded not guilty; and this was to be tried by a jury, whereof the plaintiff was one; and that after the witnesses were sworn and examined in the cause, he and his fellows found the prisoners, *Penn* and *Mead*, not guilty, whereby they were acquitted: *et quia* the plaintiff *malè se gesserit* in acquitting them both against the direction of the Court in matter of law and against plain evidence, the defendant and the other commissioners then on the bench fined the jury forty marks a-piece, and for non payment committed them to NEWGATE, &c.—The plaintiff replies *de injuriâ suâ propriâ*, ABSQUE HOC that he and his fellows acquitted *Penn* and *Mead* against evidence: and to this the defendant demurred.

GOODFELLOW, *Serjeant*, who would have argued for the defendant, said, that he would not offer to speak to that point, whether a judge can fine a jury for giving a verdict contrary to evidence, since the case was so lately and solemnly resolved by all the judges of *England*, in *Bushel's Case (a)*, that he could not fine a jury for so doing. But admit a judge cannot fine a jury, yet if he do, no action will lie against him for so doing, because it is done as a judge. 12. *Hen.* 4. *pl.* 3. 27. *Ass. pl.* 12.—But THE COURT told him, that he need not to labour that point, but desired to hear the argument on the other side, what could be said for the plaintiff.

*[219] * NEWDIGATE, *Serjeant*, argued, that this action would lie.—FIRST, It must be admitted that the imprisonment of the jury was unlawful; and then the consequence will be, that all that was done at that time by the commissioners or judges was both against MAGNA CHARTA and other acts of parliament, the petition of right, &c. and therefore their proceedings were void, or at least very irregular, to imprison a jury-man without presentment or due process in law; and consequently the party injured shall have an action for his false imprisonment. In the Year Book 10. *Hen.* 6. *f.* 17. in an action brought for false imprisonment, the defendant justifies the commitment to be for suspicion of felony; but because he did not shew the ground of such suspicion, the justification was not good. The trial of *Penn* and *Mead*, and all incidents thereunto, as swearing the jury, examining of the witnesses, taking of the verdict, and acquitting the prisoner, were all within the commission; but the fining of the jury, and the imprisoning of them for non-payment there [illegible] not justifiable by their commission;

(a) Vaugh. 146.

and

and therefore what was done therein was not as commiſſioners or judges. If this action will not lie, then the party has a wrong done for which he can have no remedy; for the order for paying of the fine was made at THE OLD-BAILEY, upon which no writ of error will lie (*a*); and though the objection, that no action will lie againſt a judge of record for what he doth *quatenus* a judge, be great; the reaſon of which is, becauſe the king himſelf is *de jure* to do juſtice to his ſubjects, and becauſe he cannot diſtribute it himſelf to all perſons, he doth therefore delegate his power to his judges, and if they miſbehave themſelves the king himſelf ſhall call them to account and no other perſon, 12. *Co.* 24, 25.; that concerns not this caſe, becauſe what was done here was not warranted by the commiſſion, and therefore the defendant did not act as a judge: and this difference hath been taken and allowed, that in the caſe of an officer, if the Court have juriſdiction of the cauſe, no action will lie againſt him for doing what is contrary to his duty; but if all the proceedings are *coram non judice*, and ſo void, an action doth lie. 10. *Co.* 77. So in the caſe of a juſtice of the peace, or conſtable, where he exceeds his particular juriſdiction: ſo if a judge of *niſi prius* doth any thing not warranted by his commiſſion it is void. And that the commiſſioners here had no power to impoſe this fine, he argued from the very nature of the pretended offence, which was neither a crime or in any wiſe puniſhable, becauſe what the plaintiff did was upon his oath: and for that reaſon it hath * been adjudged in the caſe of *Agard v. Wild* (*b*), that an action would not lie againſt one of the grand jury after an acquittal, for procuring one to be indicted for barratry, becauſe he is upon his oath, and it cannot be preſumed that what he did was in malice. The *habeas corpus* gives the party liberty, but no recompence for his impriſonment; that muſt be by an action of falſe impriſonment: if otherwiſe, there would be a failure of juſtice; and it might encourage the judges to act *ad libitum*, eſpecially in inferior courts, where mayors and bailiffs might puniſh juries at their pleaſures; which would not only be a grievance to the ſubject, but a prejudice to the king himſelf, becauſe no juries would appear where they are ſubject to ſuch arbitrary proceedings. An action on the caſe lies againſt a juſtice of the peace for refuſing to take an oath of a robbery committed, 1. *Leon.* 323. and yet it was objected that there he was a judge, *quære Brook*, 204. *March*, 117. For theſe reaſons he prayed judgment for the plaintiff. [220]

But THE WHOLE COURT were of opinion, that the bringing of this action was a greater offence than the fining of the plaintiff, and committing of him for non-payment; and that it was a bold attempt both againſt the government and juſtice in general. The Court at THE OLD BAILEY had juriſdiction of the cauſe, and might try it, and had power to puniſh a miſdemeanor in the jury:

(*a*) See the caſe of Crawle *v.* Crawle, 1. Vern. 170.; and the Rioters Caſe, 1. Vern. 175.
(*b*) Bridg. 131.

they

HAMOND against HOWELL, RECORDER OF LONDON.

they thought it to be a misdemeanor in the jury to acquit the prisoners, which in truth was not so, and therefore it was an error in their judgments, for which no action will lie: how often are judgments given in this court reversed in the king's bench! And because the judges have been mistaken in such judgments, must that needs be against MAGNA CHARTA, the petition of right, and the liberties of the subject? These are mighty words in sound, but nothing to the matter. There hath not been one case put which carries any resemblance with this; those of justices of the peace and mayors of corporations are weak instances; neither hath any authority been urged of an action brought against a judge of record for doing any thing *quatenus* a judge. That offences in jurymen may be punished without presentment is no new doctrine, as if they should either eat or drink before they give their verdict, or for any contempt whatsoever; but it is a new doctrine to say, that if a fine be set on a juryman at THE OLD

*[221] BAILEY, he hath no remedy but to pay it; for a *certiorari** may be brought to remove the order by which it was imposed, and it may be discharged if the Court thinks fit. As to what hath been objected concerning the liberty of the subject, that is abundantly secured by the law already; a judge cannot impose a fine upon a jury for giving their verdict contrary to evidence. If he doth any thing unjustly or corruptly, complaint may be made to the king, in whose name judgments are given, and the judges are by him delegated to do justice; but if there be error in their judgments, as here, it is void; and therefore the barons of the exchequer might refuse to issue process upon it; and there needs no writ of error, for the very estreats will be vacated. Though the defendants here acted erroneously, yet the contrary opinion carried great colour with it, because it might be supposed very inconvenient for the jury to have such liberty as to give what verdicts they please; so that though they were mistaken, yet they acted judicially, and for that reason no action will lie against the defendant. —Judgment was given accordingly (*a*).

See The King v. The Inhabitants of Essex, 4. Term Rep. 538.

(*a*) See the case of Johnstone v. Sutton, 1. Term Rep. 493.; and Sutherland v. Murray, 1. Term Rep. 538.

Case 131.

The Case of the Warden of the Fleet.

The houses within the rules of the Fleet are no part of the prison, so as to prevent civil process from being executed therein; and if the warden encourage resistance to such process, the court of *common pleas* will interpose in a *summary way*. S.C. Eq. Ab. 128. C.o. C r. 456.

TURNER, *Serjeant*, made complaint, on the part of the parishioners of *St. Bride's*, in *London*, against the WARDEN OF THE FLEET and his prisoners, For that he suffered several of them to be without the walls of his prison, in taverns and other houses adjoining to the prison and fronting *Fleet-ditch*, where they committed disorders; and when the constable came to keep the peace, and to execute a warrant under the hand and seal of a justice of peace, they came in a tumultuous manner, and hindered the execution of justice, and rescued the offenders, and often beat the officers; the warden often letting out twenty or thirty of his prisoners upon any such occasion to inflame the disorder.

It was prayed, therefore, that this Court, to which the prison of THE FLEET doth immediately relate, might give such directions

tions to the warden, that theſe miſchiefs for the future might be prevented, and that the Court would declare thoſe houſes out of the priſon to be ſubject to the civil magiſtrate. THE CASE OF THE WARDEN OF THE FLEET.

THE COURT were all of opinion (except ATKINS, *Juſtice*, who doubted), that nothing can properly be called the priſon of THE FLEET * which is not within the walls of the priſon *(a)*, * [222] and that the warden cannot pretend an exemption from the authority of the civil magiſtrate in ſuch places as are out of the priſon walls, though houſes may be built upon the land belonging to THE FLEET; for the preſervation of the king's peace is more to be valued than ſuch a private right.

But ATKINS, *Juſtice*, ſaid, if ſuch places were within the liberties of THE FLEET, he would not give the civil magiſtrate a juriſdiction in prejudice of the warden, but thought it might be fit for the Court to conſider upon what reaſon it was that the WARDEN OF THE FLEET applied ſuch houſes to any other uſes than for the benefit of the priſoners.

Whereupon THE COURT appointed THE PROTHONOTARIES to go thither, and give them an account of the matter, and they would take farther order in it.

(*a*) By the 8. & 9. *Will.* 3. c. 27. IT IS RECITED, that by reaſon of many ill practices of the *Warden of the Fleet*, &c. both debtors and creditors had been notoriouſly abuſed; AND ENACTED, that all priſoners ſhall be actually detained within the priſon, or *the rules of the ſame*, until they ſhall be diſcharged by due courſe of law, &c. &c.

EASTER

EASTER TERM,

The Twenty-Ninth of Charles the Second,

I N

The Exchequer.

Sir William Montague, *Knt. Chief Baron.*

Sir Edward Turner, *Knt.*
Sir Edward Thurland, *Knt.* } *Barons.*
Sir Francis Bramſton, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

St. Mary Magdalen Bermondſey Church in Southwark. Caſe 132.

IN A PROHIBITION, it was the opinion of THE WHOLE COURT, That if a church be ſo much out of repair, that it is neceſſary to pull it down, and that it cannot be otherwiſe repaired, in ſuch caſe, upon a general warning or notice given to the pariſhioners, much more if there be notice given from houſe to houſe, the major part of the pariſhioners then preſent, and meeting according to ſuch notice, may make a rate for the pulling down of the church to the ground, and building of it upon the old foundation, and for making of vaults where they are neceſſary, as they were in this church, by reaſon of the ſpringing water.

If a church be ſo ruinous that it cannot be repaired, a veſtry, on notice given for the purpoſe by the church-wardens to the pariſhioners, may make a rate for pulling it down and re-building it on its old foundation.—S. C. 1. Mod. 236. S. C. Jones, 89. 10. Mod. 13. 1. Vent. 367.

SECONDLY, Though the rate be higher than the money paid for doing all this, yet it is good, and the churchwardens are chargeable for the overplus, they not being able to compute to a ſhilling.

A pariſh-rate, though it amount to more than is required, is good.

THIRDLY, That if any of the pariſhioners refuſe to pay their proportion according to the rate, they may be libelled againſt in the

A rate generally for the repair of "the church" is good, although it include both *the nave* and *the chancel*; and the ſpiritual court may enforce payment of it.—2. Inſt. 489. 12. Mod. 83. 327. Ld. Ray. 59. 512. 4. Com. Dig. 521.

St. Mary Magdalen Bermondsey Church in Southwark.

* [223]

the spiritual court; and if the libel alledge the rate to be *pro reparatione ecclesiæ* generally, though in strictness *ecclesia* contains both the body and chancel of the church, yet by the opinion of the court of common pleas and of the exchequer, it shall be intended, that the rate was only for the body * of the church. But in this case it was made appear clearly that the rate was only for the body, and that the minister was at the charge of the chancel.

The Court will not compel an issue on a false suggestion for a prohibition. S. C. 1. Mod. 261. 8. Mod. 336. Ld. Ray. 59.

Fourthly, And both Courts agreed, That when a prohibition is moved, and desired on purpose to stop so good a work as the building a church, the Court will not compel the parties to take issue upon the suggestion, when upon examination they find it to be false, and therefore will not grant a prohibition; for if the rate be unduly imposed, the party grieved hath a remedy in the spiritual court, or may appeal, if there be a sentence against him.

The spiritual court cannot set a rate for the repair of a church. 12. Mod. 327.

Fifthly, The bishop or his chancellor cannot set a rate upon a parish, but it must be done by the parishioners themselves; and so North, *Chief Justice*, said, that it had been lately ruled in the common pleas.

1. Vent. 367.

A prohibition does not lie against a suit to compel payment of a rate made by the parish for relieving the church. 12. Mod. 416.

Afterwards the court of king's bench was moved for a prohibition in this case, and it was denied; so that in this case there was the opinion of all the three courts.

This matter was so much laboured, because twenty-four *quakers* were reported to be concerned in the rate, and they were unwilling to pay towards the building of a church.

(*a*) See 7. & 8. *Will.* 3. c. 34. s. 4. enabling justices to compel *quakers* to pay small tithes; which statute is extended by 1. *Geo.* 1. c. 6. s. 2. to all ecclesiastical dues.

EASTER

EASTER TERM,

The Twenty-Ninth of Charles the Second,

IN

The King's Bench.

Sir Richard Rainsford, *Knt.* *Chief Justice.*
Sir Thomas Twisden, *Knt.*
Sir William Wylde, *Knt.* } *Justices.*
Sir Thomas Jones, *Knt.*
Sir William Jones, *Knt.* *Attorney General.*
Sir Francis Winnington, *Knt.* *Solicitor General.*

Paget *against* Vossius. Case 133.

A TRIAL AT THE BAR IN EJECTMENT, in which the jury found a special verdict.

An alien, who had enjoyed a pension in *Holland*, voluntarily sought refuge in *England*. A devise made to him "during his *exile* from his own native country," with a limitation over in case "he is *restored* to his country or dies," is good during his residence in this country, without such provision as may be considered a restoration to his own country.—S. C. 1. Eq. Abr. 195. S. C. 2. Lev. 91. S. C. 1. Vent. 325. S. C. 2. Jones, 73. S. C. 3. Keb. 638. 749. 779. 842. S. C. 3. Danv. Abr. 171. 8. Mod. 60. 123. 2. Bac. Abr. 64.

The case was thus: *Dr. Vossius*, the defendant, being *an alien* and a subject of the States of *Holland*, falling into disgrace there, had his pension taken from him by public authority: afterwards he came into *England*, and contracted a great friendship with one *Dr. Brown*, a prebendary of *Windsor*. Then a war broke out between *England* and *Holland*, and the king issued forth his proclamation, declaring the said war, and the *Hollanders* to be *alien enemies*. *Dr. Brown* being seised of the lands now in question, being of the value of 200l. *per ann.* and upwards, made his will in these words in writing, *inter alia*, *viz.* "ITEM, I give all my "manor of *S.* with all my freehold and copyhold lands, &c. to "my dear friend *Dr. Isaac Vossius*, during his exile from his own "native country; but if it please God to restore him to his coun- "try, or take him * out of this life,' then I give the same, im- "mediately after such restoration or death, to *Mrs. Abigail* "*Heveningham* for ever." A peace was afterwards concluded

between *England* and *Holland*, whereby all intercourses of trade between the two nations became lawful; but *Dr. Vossius* was not sent for over by THE STATES, nor was there any offer of kindness to him, but his pension was disposed of and given to another. It was also found, that *the Doctor* might return into his own country when he pleased, but that he still continued in *England*.

The question was, Whether he or the lessor of the plaintiff, *Mrs. Heveningham*, had the better title?

NOTA, *Dr. Vossius* was enabled to take by grant from the king.

PEMBERTON, *Serjeant*, *for the lessor of the plaintiff*, argued, that the estate limited to the defendant is determined; which depended upon the construction of this devise. He did agree that the will was obscure, and the intent of the devisor must be collected from the circumstances of the case; and it is a rule, that according to the intent of the parties a will is to be interpreted (*a*). It is plain then that the devisor never intended the defendant an estate for life absolutely, because it was to depend upon a limitation, and the words are express to that purpose, for he devises to him "during his exile, &c." Now the question is not so much what is the genuine and proper sense and signification of those words, as what the testator intended they should signify.—FIRST, Therefore the most proper signification of the word "exile," is a penal prohibiting a person from his native country; and that is sometimes by judgment or edict, as in the case of an act of parliament; and sometimes it is chosen to escape a greater punishment, as in cases of abjuration and transportation, &c. But he did not think that the testator took the word "exile" in this restrained sense, for *Dr. Vossius* was never formally or solemnly banished: if that should be the sense of the word, then nothing would pass to *the Doctor* by this will, because the limitation would be void; and like to the case of a devise to a married woman *durante viduitate*, and she dies in the life-time of her husband; or to a woman sole during her coverture; or of a devise to *A.* the remainder to the right heirs of *B.* and *A.* dies living *B.*; so that this could not be his meaning.—

* [225] SECONDLY. * The word "exile" in common parlance is taken only for absence from one's native country; but this is a very improper signification of the word, and nothing but *a catachresis* can justify it; and therefore the testator could not intend it in this sense; it is too loose and inconsiderable an interpretation of the word for the judgment of the Court to depend on, unless there were circumstantial proofs amounting almost to a demonstration that it was thus meant: but it plainly appears, by the following words, this was not the meaning of the testator, for it is said, "if it please "God to restore him to his country;" which shew that there was some providence or other which obstructed his return thither, and so could not barely intend a voluntary absence; for if so he might

(*a*) Cro. Jac. 62. 371. 416.

have

have expressed it, *viz.* "during his absence from his country," or "till his return thither," or "whilst he should stay in *Eng*-"*land*," and not in such doubtful words.—THIRDLY, By the word "exile" is meant a person's lying under the displeasure of the government where he was born, or of some great persons who have an influence upon the government, or have an authority over him, which makes him think it convenient (considering such circumstances) to withdraw himself, and retire to some other place; and this is a sense of the word between both the former; and even in the common law we are not strangers to the acceptation of the word in that sense. There is a case *omni exceptione major* in the writ of waste, which is, "*fecit vastum de domibus, venditionem* "*de boscis, et exilium de hominibus*;" it is in THE REGISTER; and in the writ on the statute of *Marlebridge*, *cap*. 24. where by the "*auxilium de hominibus*" is meant the hard usage of tenants, or the menacing of them, whereby they fly from their habitations, 2. *Hen*. 6. *pl*. 11. It is found in this case, that the defendant was under the displeasure of his governors; the war broke out, and therefore it might not then be safe for him to return; and for that reason he might think it safe for himself to abide here; and this *Dr. Brown* the testator might know, which might also be the reason of making the will. But now all acts of hostility are past, and so the defendant's recess is open, and it hath pleased God to restore *the Doctor*, but he is not pleased to restore himself, for the jury find he is not returned; now if a man hath an estate under such a limitation to do a thing which may be done when it pleaseth the party, in such case, if he neglect or refuse to do the thing, the estate is determined, 15. *Hen*. 7. *pl*. 1. * If I grant a man an annuity till he be promoted to a benefice, and I provide a presentation for him, and he will not be instituted and inducted, the annuity ceases; so shall the estate in this case, because the devisor seems to appoint it to the defendant till he may return. * [226]

MR. HOLT, *contra*, held, that the estate is not determined, but had a continuance still. In his argument he considered these four things:—FIRST, Whether upon *Dr. Vossius*'s coming into *England* (being under the displeasure of the government where he was born) he was "an exile." And he held, that he was *an exile*, which word in plainness of speech doth not only concern a person prohibited to live in his native country, by act of state, but one who leaves his country upon other occasions; and *Calvin* the civilian in his *Lexicon* tells us, that "AN EXILE is one *qui extra* "*solum habitat*;" and in all the descriptions of *exilium* it is divided into voluntary and involuntary: PLUTARCH and LIVY use it in the sense of a voluntary leaving of a native country, where it is said of *Petrellus*, "*in voluntarium profectus est* EXILIUM." If a man leave his country upon the displeasure of the governors, or fearing any danger of life, or even upon the loss of his livelihood, this is little different from involuntary exile; and this is the case of the defendant, who, though he is not prohibited to continue in such exile, yet he is disabled to return; and though he is

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not punished for staying, yet if he return he is in danger of being starved. As for the case of EXILIUM *de hominibus*, it makes for the defendant's purpose; for in 1. *Inst.* 53. b. it is said, if tenants be impoverished, that is an *exilium*; and have not THE STATES taken away *the doctor's* livelihood, and impoverished him as much as they can? and therefore he had good cause to seek relief elsewhere. Now the same cause continues still, for it is not found by the special verdict that there was any reconciliation between the States and him, or that he may have his pension again if he should return; but on the contrary, that it is disposed of to another; and it is apparent that there was a great friendship between the testator and the defendant, who took notice of the circumstances of *Dr. Vossius*'s condition at that time, which is in no sort altered from what it was at the time of the making of the will; so that by the word "restored" nothing else could be intended by *Dr. Brown* than when his friend should have the favour of THE STATES, and a

* [227] comfortable subsistence in his own country. SECONDLY, * *Dr. Vossius* is not to be considered with any relation to the war, because he came to *England* before the war was proclaimed; neither doth it appear by the special verdict that he was any wise concerned in it: if a subject of *England* go into *Holland*, and a war break out, it is no restraint of his person if he be not active in it, for he may return, as he hath opportunity so to do. THIRDLY, Admitting *Dr. Vossius* to be concerned in the war, yet the peace ensuing can be no restitution of him to his country; that only extinguishes the hostility between the two nations, and doth not restore the doctor, who during the war adhered to the king of *England*, and so was a rebel to THE STATES; and for that reason a peace shall not extend to pardon him. FOURTHLY, Admitting *the doctor* to be no *exile*, then the limitation in the will is void, and a void limitation is like a void condition, and then the estate is absolute in him; if it had been a condition precedent, as a devise to him in case he was not *an exile*, that had prevented the vesting of the estate; but if the subsequent limitation be impossible, they must shew on the other side that the estate is determined.

RAINSFORD, *Chief Justice*, was clear of opinion, that the estate doth continue in the defendant by this limitation until the circumstances of his case (as to the favour of THE STATES, and the offer of his pension, or some competent way of livelihood) differ from what they did at the time of the making of the will; and it doth not appear that there was any alteration of his condition, nor any expectation of a pension from the States now, more than he had at that time.

Whereupon in *Michaelmas Term* following, judgment was given for the defendant *Vossius* by the opinion of THE WHOLE COURT OF KING'S BENCH.

Strangford

Strangford *against* Green.

Case 134.

If one of two partners sign an arbitration-bond "for himself and partner," when the partner is not a party to the arbitration, he is not bound to perform the award.—Dyer, 216. 3. Lev. 17. 12. Mod. 130. 423. 589. Stra. 1024. 1082. Ld. Ray. 964. Kyd on Awards, 24.

ACTION ON THE CASE FOR NON-PERFORMANCE OF AN AWARD.—The defendant had, in behalf of himself and his partner, referred all differences and controversies between the plaintiff and them to arbitrators, and promised to perform their award; which was, That all suits which are prosecuted by the plaintiff against the defendant shall cease, and that he shall pay the plaintiff so much, &c. And for non-payment this action was * brought upon this special declaration, to which the defendant did demur.

On a submission concerning partnership, an award that "all suits shall cease," shall be intended all suits concerning the partnership.—Cro. Jac. 639.

FIRST, Because the submission was only of matters *concerning the partnership*, and the award was, that *all suits* shall cease.—But this exception was not allowed; for no difference shall be intended but what concerned the plaintiff and the defendant, as the defendant was concerned with his partner in trade only, unless the contrary did appear; and if any such were, they should be shewn on the other side.

An award shall only refer to matters between the plaintiff and the defendant.

SECONDLY, It was of all matters between the *plaintiff* and *the partner*, and the award is, That all suits prosecuted against *the defendant only* shall cease.—THE COURT. It shall be intended likewise that all suits shall cease only between the plaintiff and the defendant.

An award that "all suits shall cease," is mutual, and amounts to a release. Cro. Jac. 448. 653. 1. Roll. Abr. 253. 8. Mod. 35. 1. Lev. 58. 1. Com. Dig. 388. 4. Bac. Abr. 267. Kyd on Awards, 149.

THIRDLY, The award is not mutual; for the defendant is to pay money, but the plaintiff is to give no release; it is only said that all suits shall cease.—THE COURT, That is an award on both sides; for the awarding that all suits shall cease, hath the effect of a *release*; and the submission and award may be pleaded in discharge as well as the release.

If a man sign an arbitration-bond "for himself and *partner*," a refusal by the partner to perform the award is a breach of the condition, although he is not a party to the submission.—1. Roll. Abr. 244. Cro. Jac. 663. 12. Mod. 129. 1. Salk. 70. Skin. 679. 1. Com. Dig. 380.

FOURTHLY, The other partner is not made a party to the submission.

THE COURT. The defendant may undertake for his partner, and having engaged for him, and promised that he should perform the award on his part (notwithstanding the partner is not bound so to do), yet if he refuse, it is a breach of the defendant's promise.

And so the plaintiff had judgment upon the first argument.

Case 135. Sir John Shaw *against* a Burgess of Colchester.

If a person takes papers from an officer while he is taking *the poll* for the election of a new officer, an action on the case will lie for the disturbance.

Moor, 706. Latch. 87. Salk. 468. 8. Mod. 52. 354.

THIS was upon a trial at the bar, wherein the case was this:

The plaintiff was a serjeant at law and recorder of *Colchester*, and the defendants, resolving to turn him out, procured articles of misdemeanour to be drawn against him, and then all who had liberty to vote proceeded to vote for and against him, and a poll was granted to decide the controversy, it not appearing upon the view which had the majority of votes; but before the plaintiff had taken all the names, and whilst he was taking of the poll, the defendants took away the paper, and would not suffer him to proceed.

The Jury gave him 300l. damages.

EASTER TERM,

The Twenty-Ninth of Charles the Second,

IN

The Exchequer.

Sir William Montague, *Knt. Chief Baron.*

Sir Edward Turner, *Knt.*
Sir Edward Thurland, *Knt.* } *Barons.*
Sir Francis Bramston, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

* Trotter *against* Blake. Case 136.

The steward of a manor may enter on a copyhold forfeited for the non payment of the fine assessed upon admittance, without making *a precept* for seizure, or having a *written authority* from THE LORD, provided he has made a *personal demand* on the tenant, and the tenant has expressly refused to pay the fine. Hob. 135. Ray. 42. Co. Ent. 647.

THIS was the case of my *Lord Hollis* upon a trial at the bar in the exchequer in an ejectment, wherein the case was this:

Lord Hollis was seised of the manor of *Aldenham*, in the county of *Hertford*, in fee, and the lands in question were held of the said lord by copy of court-roll, and are parcel of the aforesaid manor. The defendant was admitted tenant, and a fine of eight pounds imposed upon him for such admittance, payable at three distinct payments. The eight pounds was personally demanded of him by the lord's steward, and he refused payment; whereupon the lord enters and seizes the estate for *a forfeiture*, which he would not have insisted on, but that the obstinacy of the defendant made it necessary for him to assert his title and right. *Mr. Walker*, the *Lord Hollis*'s steward, being sworn, gave evidence, that a fine of eight pounds was set upon the defendant when he was admitted, and that the lands to which he was admitted were usually let for seven pounds *per annum*, so that the fine was but a little more than a year's value: that he himself demanded the eight pounds of the defendant, being a seafaring-man, who refused to pay it: that he

TROTTER *against* BLAKE.

knew the defendant to be the same person who was admitted to this copyhold: that the demand was made at the steward's chamber in *Staple Inn*; and because it was payable at three several days, he then demanded of him only 2l. 13s. 4d. as a third part of the eight pounds; and that he did enter upon the 25th day of *November* last for non-payment of the said 2l. 13s. 4d.

THE COUNSEL *for the defendant* insisted, that the steward ought to produce an *authority in writing*, given to him by the lord to make this demand and entry upon refusal, for the lord's owning it afterwards will not make a forfeiture.

But THE COURT held clearly that there was no need of an express authority in writing, and that it was not necessary for the steward to make *a precept* for the seizure, but that it was necessary that the demand should be personal.

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If, on a survey being taken of a manor, a copyholder be decreed to pay a *year's value* to the lord as a fine on every admittance, leaving it uncertain whether it shall be computed according to the improved value, or according to the rent at the time the decree was made, the lord cannot enter as for *a forfeiture* on the non-payment of a fine assessed according to the improved value.

The reason why the defendant refused to pay this fine was, Because, he said, that by a decree and survey made of this manor in the reign of *Queen Elizabeth*, the fine to be paid for this copyhold was settled, and it was but three pounds, and no more.

* SIR FRANCIS WINNINGTON, *Solicitor General*, said, *for the defendant*, that the case was very penal on his side, but that he would make it clear that there was no colour for the bringing of this action, either as to the matter or the form. He said, that the manor of *Aldenham* had not been long in this noble lord; he came in as purchaser or a mortgagee under the family of the *Harveys*, whose inheritance it was anciently; and there has been some doubt, whilst it was in their possession, what fines were customary to be paid upon descents and alienations, but that is now settled; and the defendant was in the case of a descent for which the fine is not to be arbitrary at the will of the lord, but is reduced to a certainty in *Queen Elizabeth*'s reign, by consent and agreement between the lord and tenants; and that a survey was then made by virtue of a commission directed to some men of credit and worth in those days, who were impowered to set forth the quantity of land and the value thereof, which was done accordingly; and it was then agreed that a year and an half's value in case of a descent, and two years value in case of an alienation, should be paid as a fine to the lord, and the proportion of the value was then computed by the commissioners, and decreed by the court of chancery to be binding to the lords and tenants for ever. THE QUESTION NOW is, How this year's value shall be computed? The lord would have it according to the improved value; the tenant will pay according as it was rated in *Queen Elizabeth*'s time by those commissioners: now if this land had decayed in value, the tenant had still been obliged to pay a fine according to the valuation of that time; and if so, it would be very unreasonable to make him pay for his industry and improvement of the land now it is raised in value, because that was done by his labour and at his expence; so that the doubt being what fine shall be paid, an ejectment will not

2. Vern. 367. Cro. Jac. 617. Cro. Car. 196. Co. Lit. 59. 4. Co. 27. 1. Roll. Abr. 507. Moor, 622. Hob. 135. 2. Bulst. 32. Chan. Rep. 464. 3. Lev. 309. 2. Stra. 1042. 2. Burr. 1717. Dougl. 722. 3. Ter. Rep. 162.

not lie, because the matter is doubtful, and the law gives the tenant liberty to contest it with the lord, and will never let him be under the peril of a forfeiture because he will not comply with the lord to give up his right without law *(a)*.

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But the lord hath another and a more proper remedy, for he may bring an action of *debt* for *the fine* thus imposed *(b)*, which will try the right; and is not so penal to the copyholder; which point was lately resolved; and that if a copyholder had a probable cause to induce him to believe that he ought not to pay the fine demanded (let the right be as it would), yet no *ejectment* will lie; for it must be only in a plain case that the lord can enter for a forfeiture. * For no man forfeits his estate but by a wilful default in himself; such a forfeiture as is done and presumed to be committed upon his own knowledge; but want of understanding cannot be made a wilful neglect. It is true, the decree in chancery made here cannot vary the law, but it may be evidence of the fact; for *primâ facie* it shall be intended that such values have been paid time out of mind, because the Court have so decreed; but then when the fine was declared to be certain, a doubt did arise how the year's value shall be reckoned, which has been settled also by another decree; and from that time all the respective lords of this manor have taken fines according to that value which is mentioned in the survey, and this lord himself hath taken fines in pursuance of the same, so that it is clear the fine cannot be arbitrary; but be it so or not, it is not material to this purpose, because the tenant hath a good and colourable ground to insist upon the decree and survey, and consequently there is no wilful forfeiture.

The question, Whether a fine assessed on admittance be reasonable, or the refusal to pay it a forfeiture? may be tried in an action of *debt* to recover the fine; but an *ejectment* will not lie; for if it be doubtful, it is a proper case for *equity*.

1. Sid. 58. Lut. 597. Clift. 244. 3. Mod. 240. Hard. 487. 3. Lev. 116. Prec.Chan. 568. 11. Mod. 18. 12. Mod. 138. 3. Peer. Wms. 151. 256. 1. Stra. 452. 2. Stra. 1042. in point. 2. Stra. 1070. See 9. *Geo.* 1. c. 29.

THE LORD CHIEF BARON agreed, That if it be a doubt, and the tenant give a probable reason to make it appear that no more is due than what he is ready to pay, it is no forfeiture; but the law in general presumes that the fine is uncertain, if the contrary is not shewed. Now if the tenant's doubt did arise upon the equitableness of the fine, in such case if he refuse to pay, it is a forfeiture. But here it was, whether it shall be paid according to the computed or improved value, and therefore he inclined that the action would not lie.

THURLAND, *Baron*, said, that no action of *debt* would lie for this fine, because it was neither upon the *contract*, nor *ex quasi contractû*.

See Shuttleworth *v.* Garnet, 3. Mod. 240.

But MAYNARD, *Serjeant*, as to that, answered, that many resolutions had been made in his time of cases wherein the old books were silent.

(*a*) See the case of Hatton *v.* Hassel, 2. Stra. 1042.

(*b*) So also an *indebitatus assumpsit* will lie. See Shuttleworth *v.* Garnet, 3. Lev. 261. 1. Show. 35.; Evelyn *v.* Chichester, 3. Burr. 1717.; Seward *v.* Baker, 1. Term Rep. 616.

THE

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THE COURT, upon the whole, thought this to be a proper case for *equity (a)*; and so directed a juror to be withdrawn, which was done accordingly.

A decree may be read in evidence from *an exemplification* under the seal of the court.

The exemplification of the decree was offered to be read: which being opposed, MAYNARD, *Serjeant*, informed the Court, that nothing was more usual than to read a sentence in the ecclesiastical court, or a decree in chancery, as evidence of the fact; and it being allowed to be read,

1. Keb. 21. Bull. N. P. 243. Gilb. Evid. 67.

The duplicate of a commission in chancery cannot be read, though the original is destroyed, without proof of its being a true copy.

THE COUNSEL *for the defendant* took notice, that the commission was therein mentioned, which was returned into chancery, and burned when the Six Clerks office was on fire in the year 1618; but a duplicate thereof was produced, which the defendant had from the heir of the *Harveys*, and so the survey was prayed to be read.

This was opposed by SIR WILLIAM JONES; for he said that it was no duplicate, the commissioners names being all written with one hand, and no proof being made that it was a true copy of that which was returned.

If a decree appoint a commission, but the commission is never executed, the decree is not in force.

He likewise observed upon the reading of the decree, that it was an evidence for the plaintiff, because if there had been a settled rule for payment of the fines, there had been no occasion to seek relief in *equity*, and that there * was no reason that the defendant should come into a court of law to prove such settlement by a decree in chancery, for if there be such a decree his remedy is proper there; besides, the decree itself only mentions the year's value, which was to be settled by the commissioners, and which he said was never done; so that the decree which appointed the commission was not completed, and therefore, being but executory, is of no force even in equity.

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THE COURT were doubtful in the matter.

(*a*) But see the cases of Peachy *v.* Lord Somerset, 1. Stra. 447.; Cowper *v.* Clerk, 2. Eq. Cases Abr. 229. 3. Peer. Wms. 156.; Disney *v.* Robinson, Bunb. 41.; Baker *v.* Roberts, Cases in Chan. 74.; Bouverie *v* Prentice, 1. Brown's Ch. Cases, 200. and the statute 9. Geo. 1. c. 29.

TRINITY TERM,

The Twenty-Ninth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*
Sir Hugh Wyndham, *Knt.* } *Justices.*
Sir Robert Atkins, *Knt.* }
Sir William Scroggs, *Knt.* }
Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

* Addison *against* Sir John Otway. Case 137.

If there be a parish and a vill within the parish of the same name; and a recovery is suffered of lands in the vill, and in the deed to lead the uses the parish is not named; yet, as they make but one conveyance, the lands in the parish do pass.

A SPECIAL VERDICT IN EJECTMENT.—The case was thus: There was the vill of *Rippon*, and the parish of the same name; and likewise the vill of *Kirkby*, and the parish of the same name; in the county of *York*. And *Thomas Brathwaite* being tenant in tail of the lands in question, lying in the said parishes of *Rippon* and *Kirkby*, did, by bargain and sale, convey the same, lying (as in truth they did) in the parishes of *Rippon* and *Kirkby*, to the intent to make a tenant to the *præcipe* in order to suffer a common recovery, and thereby he did covenant to suffer the same; which recovery was afterwards suffered of lands in *Rippon* and *Kirkby*, but doth not say (as he ought) in *the parishes* of *Rippon* and *Kirkby*; and the verdict in effect found, that he had no lands in *the vills*; but farther, that it was the intent of the parties, that the lands in the parishes should pass; and, Whether they should or not was the question?

S. C. 1. Mod. 250.
S. C. 1. Freem. 227.

It was said *for the defendant*, that by this indenture and common recovery the lands which lie in the said parishes shall pass.

S. C. 2. Vent. 31. S. C. 3. Keb. 771. Ante, 47. 1. Roll. Rep. 165. 5. Co. 40. Popb. 22. 1. Sid. 190. Hutton, 105. Cro. Car. 269. Cro. Jac. 574. Comyns, 386. 8. Mod. 276. 11. Mod. 181. 2. Barnes, 21. Gilb. Eq. Rep. 16. Stra. 1129. 1185. 1257. 1267. Cowp. 346. Cruise on Recov. 170. 5. Com. Dig. "Pleader" (3. A. 4.). 2. Bac. Abr. 544, 545. Cowp. 349.

FIRST,

ADDISON *against* SIR JOHN OTWAY.

FIRST, Supposing this to be in the case of a grant, there if the vill is only named, yet the lands in the parish of the same name shall pass, because the grant of every man shall be taken strongest against himself, *Owen Rep.* 61. So where part of the lands lie in *B.* and the grant is of "all the lands in *D.*" all the lands in the parish of *D.* shall pass, because in that case the parish shall be intended; and if the * law be thus in a grant, *à fortiori* in the case of a common recovery, which is the common assurance of the land.

* [234]

P *ftea*, Barker v. Keat, 249.

SECONDLY, The verdict hath found, that the defendant had no lands in the vills of *Rippon* and *Kirkby*, and the Court will not intend that he had any there, if not found; so that nothing passes by the recovery, if the lands in the parishes do not pass, which is contrary to the intention of the parties, and to the rules of law in the like cases; for if a man devise all his lands in *Dale*, and hath both freehold and leasehold there, by this devise the freehold only passes, but if no freehold the leases shall pass, *Cro. Car.* 293. so adjudged in the case of *Rose v. Bartlet*, for otherwise the will would be void.

THIRDLY, The parish and vill shall be both intended to support a trial already had; as where a *venire facias* ought to issue from the parish of *Dale*, and it was awarded from *Dale* generally, it is well enough (*a*); *à fortiori* to support a common recovery, which has always been favourably interpreted; and yet a new trial will help in the one case, but a man cannot command a new recovery when he will; and therefore the Judges usually give judgments to support and maintain common recoveries, that the inheritances of the subject may be preserved; for if there be tenant in tail, the reversion in fee, or if baron and feme suffer a recovery, this is a bar of the reversion, and the dower, and yet the intended recompence could not go to either, *Pl. Com.* 515. 2. *Roll. Rep.* 67. 5. *Co. Dormer's Case.*

FOURTHLY, The jury have found, that the intention of the parties was to pass the lands in the parishes, which intention shall be equivalent to the words omitted: and for that there is a notable case in 2. *Roll. Rep. f.* 245. where the intent of the parties saved an extinguishment of a rent. The case was, *A.* makes a lease for years, rendering rent, and then grants the reversion for forty years to *B.* and *C.* which he afterwards conveyed to them and their heirs by bargain and sale, and covenanted to levy a fine accordingly, to make them tenants to the *præcipe*, to suffer a common recovery to another use; the bargain, fine, and recovery were all executed: and it was adjudged that they made all but one conveyance, and that the reversion was not destroyed, and by consequence the rent not extinguished; for though the bargainor might intend to destroy the reversion, by making this grant to them and their heirs, yet the bargainees could never have such intention; and

(*a*) 1. Roll. Rep. 21. 27. 293. Hob. 6. Cro. Jac. 263.

though

though they were now seised to another use, yet by the statute of Wills, their former right is saved which they had to their proper use; * and their intention being only to make a tenant to the *præcipe*, the statute shall be so construed that the intent of the parties shall stand. ADDISON *against* SIR JOHN OTWAY.

FIFTHLY, The lands in the parishes pass, because the deed and common recovery make but one conveyance and assurance in the law; and therefore, as a construction is not to be made upon part, but upon the whole deed, so not upon the deed or recovery alone, but upon both together, 2. *Co.* 75. *Lord Cromwel's Case.* 1. Anders. 83.

SIXTHLY, It is the agreement of the parties which governs fines and recoveries, and lands shall pass by such names as are agreed between them, though such names are not proper; and therefore a fine of a *lieu conus* is good, though neither vill or parish is named therein, *Poph.* 22. 1. *Cro.* 270. 276. 693. *Cro. Jac.* 574. So if a fine be levied of a common of pasture in *Dale*, it is good, though *Dale* be neither vill or hamlet, or *lieu conus* out of a vill, 2. *Roll. Abr.* 19. So in *Sir George Symonds' Case*, lands as parcel of a manor were adjudged to pass, though in truth they were used with the manor but two years; and the reason of all these cases is, because it was the agreement of the parties that they should pass. If it be objected, That all these authorities are in cases of *fines*, but the case at bar is in a *common recovery*, which makes a great difference; I answer, the proceedings in both are amicable and not adversary, and therefore as to this purpose there is no difference between them; and for an authority in the point the case of *Lever v. Hosier* was cited, which was adjudged in this court *Trin.* 27. *Car.* 2. where the question was, Whether upon a common recovery suffered of lands in the town of *Sale* or the liberty thereof, lands lying in *Dale*, being a distinct vill, in the parish of *Sale*, should pass or not? and after divers arguments it was allowed to be well enough, being in the case of a common recovery: and so was the case *Pasch.* 16. *Car.* 2. in *B. R.* In a special verdict the case was, That *Sir Thomas Thinn*, being seised of the manor of *Buckland* in tail, and of twenty acres of land called and known by a particular name, which twenty acres of land were, in the time of *Edward the Sixth*, reputed parcel of the same manor and always used with it, sold the said manor and all the lands reputed parcel thereof, with the appurtenances, of which he did suffer a common recovery; and it was adjudged upon great consideration, that though the recovery did not mention the twenty acres particularly, yet it did * dock the entail thereof, because the indenture which leads the uses of the recovery was of the lands reputed parcel thereof or enjoyed with it, and that the shortness in the recovery was well supplied by the deed; in which case the Court were guided by the resolution in *Sir George Symonds' Case* (a).

Cro. Car. 308. Winch. 122. Sid. 190, 191. Antea. Sid. 190. *[236]

(a) See Sir Moyle Finch's Case, 6. Co. 63. and see 2. Bac. Abr. 544. *notis.*

The

ADDISON against SIR JOHN OTWAY.

Antea, Lever v. Hosier, 47.

The authorities against this opinion are two: FIRST, That of *Stock v. Fox, Cro. Jac.* 120. There were two vills, *Walton* and *Street*, in the parish of *Street*, and a fine was levied of lands in *Street*; it was adjudged that the lands in *Walton* did not pass by this fine. But there is another report of this very case by ROLL, *Chief Justice* (a), where it is said, If there be in the county of *Somerset* the vill of *Street*, and the vill of *Waltham* within the parish of *Street*, and a man being seised of lands in the vill of *Street*, and of other lands in the vill of *Waltham*, all within the parish of *Street*, and he bargains and sells all his lands in *Street*, and having covenanted to levy a fine, doth accordingly levy it of lands in *Street*, and doth not mention, either in the indenture or in the fine, any lands in *Waltham*, the lands lying there shall not pass; from which report there may be a fair inference made, That it was ROLL's opinion, that if *Waltham* had been named in the indenture, though not in the fine, the lands would have passed; and in this case the parishes are named in the indenture of bargain and sale; but besides in that case the party had lands both in *Street* and *Waltham*, and so the conveyances were not in vain, as they must be here if the lands in the parishes do not pass. SECONDLY, The other case is that of *Baker v. Johnson* in *Hutton* 106. But this case is quite different from that, because there was neither vill or parish named in the indenture; but here the indenture was right, for the lands are mentioned therein to lie in the parishes, &c.

Antea. 47.

And for these reasons judgment was prayed for the defendant.

This case was afterwards argued in *Michaelmas Term* following by PEMBERTON and MAYNARD, *Serjeants, for the plaintiff*, who said, That the government of this nation was ecclesiastical and civil; the ecclesiastical runs by parishes, and the civil by vills; that a parish is constituted by the ecclesiastical power, and may be altered by the king and ordinary of the place; that the parson was superintendant of the parish, and the constable of the vill, which
[237] was also constituted by the civil magistrate; * and from hence it is that in real actions which are adversary, lands ought not to be demanded as lying in a parish but within a vill, that being the place known to the civil jurisdiction; and if a trespass which is local be laid at *Dale* generally, there being both the parish and vill of *Dale*, the proof of the trespass done in the parish is not good, for it must be at the vill. They agreed, that in conveying of lands a fine or common recovery of lands in a parish or *lieu conus* was good, *Cro. Jac.* 574. but if there be both a vill and a parish of the same name, and severally bounded, if the vill be only named without the parish, nothing doth pass but what is in the vill, because where a place is alledged in pleading it must be of a vill, *Moor*, 710. *Cro. Jac.* 121. And this was the ancient way of demanding lands in a *præcipe quòd reddat*, because of the notoriety of vills from whence *visnes* do arise; and because the vill is more particular and of more

Inst. 125. b. 12. Mod. 440. Ld. Ray. 22.

(a) 2. Roll. Abr. 54.

certainty

certainty than a pariſh; and therefore it is requiſite that the demandant ſhould be very particular in his demand, that the tenant may know how to make his defence, and the ſheriff of what to deliver poſſeſſion. Beſides, a vill is more ancient than a pariſh, and lands have been demanded within them time out of mind, ſo that the demand (when it is doubtful of what it is made) ſhall be ſuppoſed of that which is moſt ancient; and ſuch conſtruction is moſt conformable to the like caſes, for *additio probat minoritatem*; and therefore if father and ſon be both of one name, and mention be made of one without an addition of *junior*, the law intends the father; ſo the vill being more ancient than the pariſh, that ſhall be intended if the pariſh is not named. In *Farmar's Caſe* (*a*), *Hartwel*, *Rode*, and *Aſhen*, were ſeveral vills in the pariſh of *Rode*; the king granted all his tithes in *Rode* and *Aſhen in tenurâ* RICHARDI WAKE, and at the time of the grant the tithes of *Hartwel* were in the tenure of *Wake*; it was adjudged in the king's bench, that the tithes in *Hartwel* did paſs: but that judgment was reverſed in the exchequer chamber, becauſe *Rode* could not be (*b*) intended a pariſh, and ſo to comprehend *Hartwel*, but muſt be intended a vill diſtinct from a pariſh; and ſo the tithes of *Hartwel* being alſo a vill could not paſs by the grant of them in *Rode*; this alſo was the opinion of POPHAM, *Owen* 60. But GAWDY and FENNER were of another opinion. As to the finding of the jury, that doth not help if the recovery be not full, for they may expound, but they cannot enlarge * each other: in a *formedon*, *nient compriſe* in the record and not what is comprised in the deed is the plea. Things upon a record are open to the view of all people, but a deed is a pocket record, and the perſons whom it concerneth cannot come at the ſight of it; ſo fines are open and to be ſeen by all, and are to be proclaimed; but according to this interpretation deeds ſhould be alſo proclaimed. And there is a manifeſt difference between things contained in a fine and in a deed; for a fine of a tenement is not good, but a deed of a tenement is well enough, but will not help the fine; and therefore men ſhould not go out of the rules of the law to help a miſtake: for which reaſons they prayed judgment for the plaintiff. * [238]

But THE WHOLE COURT were of opinion, that the lands in the pariſhes did well paſs; for as fines and recoveries did grow in uſe, and are now become common aſſurances, they are to be favoured in the law: and it hath been a rule, that even in doubtful things conſtructions ſhall be made to ſupport a deed if poſſible, *ut res magis valeat quàm pereat*, *Co. Lit.* 183. By *Rippon* generally, the vill ſhall be intended, but *ſtabitur præſumptio donec probetur in contrarium*, and that is proved by the deed which ſhews

(*a*) 2. And. 124.

(*b*) In a *præcipe* it muſt be intended a vill if a pariſh be not named, becauſe vills are known at the common law, but not pariſhes; thoſe were conſtituted by the Council of *Lyons*, but it is otherwiſe in grants.—Owen, 61. Seld. on Tithes, c. 6. ſ. 3.—*Note to the* FOURTH EDITION.

where

ADDISON against SIR JOHN OTWAY.

where the lands lie. Both the indenture and recovery being one conveyance (a), must be expounded so that every part may stand; besides, it is apparent by the intent of the parties (which the jury have also found), that the lands in the parishes should pass. In the case of *Brock v. Spencer* a trespass was laid in *Hursly*, and it was not said whether vill or parish; the defendant pleaded that the lands were held of the manor of *Marden* in the parish of *Hursly*, &c. and the *venire facias* was *de vicineto* only, and not *de vicineto parochiæ Hursley*; and it was adjudged good, for the vill and the parish shall be understood to be the same. And as to this purpose they were all of opinion, that there was no difference between a fine and recovery. It is true, the law originally took notice of a vill only, because the division of a county into parishes was of ecclesiastical distribution; but now by process of time that distinction is taken notice of in civil affairs; and the law hath great regard to the usage and practice of the people, the law itself being nothing else but common usage, with which it complies, and alters with the exigency of affairs. It was but lately that the cursitors would put the word "parish" into a writ; for if a note
[239] was delivered to * them of lands in the parish of *Dale*, they used always to make it of lands in *Dale*, till the Court ordered them to do otherwise; so that though the common usage was so formerly it is now otherwise; and the reason of things changing, the things themselves also change. And if this recovery should not be construed to pass the lands, the intention of the parties would fail. It is true, there is no authority express in the point to guide this judgment, nor is there any against it; but if such should be, the opinion of the Court is not to be bound against apparent right; and it is for the honour of the law that men should enjoy their bargains according as they intended.

For which reasons judgment was given for the defendant.

(a) Indenture by an infant to declare uses of a fine or recovery make but one conveyance; otherwise he might avoid it, as he may a deed, by infancy.—Hob. f. 6. Cro. Jac. 676. Dougl. 45.

Case 138. **Goffe *against* Elkin.**

In an action of covenant to make such a conveyance of lands in *Jamaica* as counsel shall advise, A PLEA that counsel did advise a bargain and sale with the *usual covenants* is good, without setting out the covenants particularly.—Keilway, 95. 1. Lev. 72. 2. Leon. 39. 12. Mod. 78. Ld. Ray. 106. 968. 1140. 1. Bac. Abr. 459. Cowp. 665. 727. Dougl. 667.

THE CONDITION OF A BOND was, That if the plaintiff shall seal to the defendant a good and sufficient conveyance in the law of his lands in *Jamaica*, with usual covenants, in such manner as by the defendant's counsel shall be advised; then if the defendant should thereupon pay to the plaintiff such a sum of money, &c. the condition should be void. In DEBT brought upon this bond, the defendant (after *oyer* of the condition) pleads that *Mr. Wade*, a counsellor at law, did advise a deed of bargain and sale from the plaintiff to the defendant, with the usual covenants, of all his

lands

lands in *Jamaica*, and tendered the conveyance to the plaintiff, who refused to seal the same, and so would discharge himself of the condition, the money being not to be paid unless the assurance made. To this plea the plaintiff demurred. Coppe against Elkin.

George Strode, *Serjeant*. The defendant hath not shewed the conveyance; and an affirmative plea ought to be particular, and not so general as this; for to plead generally *quòd exoneravit* is not good, but it must be shewed how; and so it was adjudged in the case of *Horseman v. Obbins* (*a*), where the condition was to indemnify lands from the yearly rent of twenty pounds during the demise, the defendant pleaded, *quòd à tempore confectionis scripti obligatorii hucusque exoneravit*, &c. and upon demurrer, as here, it was held no good plea.

* Secondly, The matter of the condition consists both of law and fact, and both ought to be set out; the preparing of the deed is matter of fact, and the reasonableness and validity thereof is matter of law, and therefore they ought to be set forth that the Court may judge thereof. In 22. *Edw.* 4. *pl.* 40. (*b*) the condition of a bond was, that the defendant should shew the plaintiff a sufficient discharge of an annuity; and it was pleaded, that he tendered a good and sufficient discharge in general, without setting it forth; and held not good. * [240]

Thirdly, The plea is, that the indenture had the usual covenants, but doth not set them forth, and for that cause it is also too general. In 26. *Hen.* 8. *pl.* 1. the condition was for the performance of covenants, one whereof was, that he should make such an estate to the plaintiff as his counsel should advise: the defendant pleaded, that he did make such conveyance as the counsel of the plaintiff did advise; and the plea was held ill and too general, because he shewed not the nature of the conveyance; and yet performance was pleaded according to the covenant. 1. Mod. 67. 11. Mod. 78. Ld. Ray. 106. 968. 1140.

But notwithstanding these exceptions the whole Court were of opinion that this plea was good; for if the defendant had set forth the whole deed *verbatim*, yet because the lands are in *Jamaica*, and the covenants are intended such as are usual there, the Court cannot judge of them, but they must be tried by the jury. He hath set forth that the conveyance was by a deed of bargain and sale, which is well enough; and so it had been if by grant, because the lands lying in *Jamaica* pass by grant, and no livery and seisin is necessary; if any covenants were unreasonable and not usual, they are to be shewed on the other side. See Medwin v. Sandham, 1. Term Rep. 705.

And so judgment was given for the defendant.

(*a*) Cro. Jac. 634. See also Cro. Jac. 503. 634. 2. Co. 4. Cro. 383. 2. Leon. 214. 10. Mod. 143. 329. 384. 12. Mod. 406.

(*b*) Hob. 107.

Case 139.

Verdict cures the mis-recital of the time of the session of parliament.

Spring *against* Eve.

DEBT UPON THE STATUTE OF 29. *Eliz.* c. 4. by the sheriff for his fees for serving of an execution; and verdict for the plaintiff.

* [241]

S. C. 3. Keb. 742. 1. Vern. 113. 2. Vern. 711. Ld. Ray. 77. 210. 343. 371. 382. 1224. 4. Bac. Abr. 568. Cowp. 474. 2. Bl. Rep. 1103. Dougl. 683.

PEMBERTON, *Serjeant*, moved in an arrest of judgment, Because the time of holding the parliament was mis-recited, being mistaken in both the statute books of *Poulton* and *Keble*, as it appeared by the parliament roll *(a)*; whereupon judgment was stayed till this Term; and the Court had copies out of the rolls of the time when the parliament was * held, and they were all clear of opinion that the time was mistaken in the declaration, and so are all the precedents; for the plaintiff here declared, that this statute was made at a session of parliament by prorogation held at *Westminster*, 15 *February*, 29. *Eliz.* and there continued till the dissolution of the same; whereas in truth the parliament began 29 *October*, and not on the 15*th* of *February*; for it was adjourned from that time to the 15*th* of *February*, and then continued till it was dissolved. My *Lord Coke* in his 4*th Institute*, *fol.* 7. takes notice of this mistake in the printed books.

But THE COURT were all of opinion, that though it was mistaken and ought to have been otherwise (*b*), yet being *after verdict* it is well enough (*c*), and the rather because this is a particular act of parliament, and so they are not bound to take notice of it; and therefore, if it be mistaken, the defendant ought to have pleaded *nul tiel record*; but since he hath admitted it by pleading, they will intend that there is such a statute as the plaintiff hath alledged, and they could not judicially take notice of the contrary.

THE SERJEANT, perceiving the opinion of the Court, desired time to speak to it, being a new point; and told the Court, that they ought to take notice of the commencement of *private acts*, which the whole Court denied.

And THE CHIEF JUSTICE said, that they were not bound to take notice of the commencement of *a general act* (*d*), for the Court was only to expound it; and though this had not been in the case of a particular act (where it is clear the defendant ought to plead *nul tiel record)*, yet being after verdict it is well enough, because the party took no benefit of it upon the demurrer, and because of the multiplicity of precedents which run that way. So in the case upon the statute of tythes, though it be mistaken,

(*a*) See 3. Lev. 333. 1. Lutw. 203. 3. Keb. 813. Ld. Ray. 77. 3. Bac. Abr. 42. 43. 2. Bl. Rep. 1102.

(*b*) See the case of Ran *v.* Green, Cowp. 474. in point. But see Dougl. 97. note (41.).

(*c*) Dyer, 95. Yelv. 27. Cro. Jac. 111. Bro. Abr. "Parliament," 87.

(*d*) See the case of Bourke *v.* Morgan, in the house of lords, January 7, 1717, that the commencement of a statute relates to the first day of the session. *Note to the* FOURTH EDITION, although the words be, that it shall "take effect "from the passing of the act." Lotley *v.* Holmes, 4. Term Rep. [illegible]

yet

yet it hath often been held good; as if an action be brought upon that statute for not setting out of tythes, declaring, "*quòd cùm* "*quarto die Novembris anno secundo Edw.* 6. it was enacted, &c." and the parliament began 1. *Edw.* 6. and was continued by prorogation until 4 *Novembris*, yet this hath often been held good, and *multitudo errantium tollit peccatum*. * And though in this case the parliament was adjourned, but in that upon the statute of *Edw.* 6. it was prorogued, yet the Chief Justice said, that as to this purpose there was but little difference between an adjournment and a prorogation; for an adjournment is properly where the house adjourn themselves, and a prorogation is when the king adjourns them. * [242]

11. Mod. 113. 12. Mod. 604. Ld. Ray. 343.

But ATKINS, *Justice*, doubted whether the Court ought not to take notice of the commencement of *a general act*, and could have wished that there had been no such resolution as there was in the case of *Partridge v. Strange* in the *Commentaries* (*a*); for that he was satisfied with the argument of MORGAN, *Serjeant*, in that case, who argued against that judgment, and held that he who vouched a record and varies either in the year or Term, hath failed of his record: but since there had been so many authorities since in confirmation of that case, he would say nothing against it. But he held that there was a manifest difference between an adjournment and a prorogation; for an adjournment makes a session continue; but after a prorogation all must begin *de novo*; and that an adjournment is not always made by themselves, for the chancellor hath adjourned the house of peers *ex mandato domini regis*; and *Queen Elizabeth* adjourned the house of commons by commission under THE GREAT SEAL.

4. Inst. 7. 1. Vern. 113. Prec. Chan. 77.

(*a*) Plowd. 77.

Mires *against* Solebay. Case 140.

TROVER AND CONVERSION.—On a special verdict the case was this, *viz. H.* being possessed of several sheep sells them in a market to *Alston*, but did not deliver them to the vendee. Afterwards, in that very market, they discharge each other of this contract, and a new agreement was made between them, which was, that *Alston* should drive the sheep home and depasture them till such a time, and that during that time *H.* would pay him so much every week for their pasture; and if at the end of that time (then agreed between them) *Alston* would pay *H.* so much for his sheep (being a price then also agreed on), that then *Alston* should have them. Before the time was expired *H.* sells the sheep to the plaintiff *Mires*, and afterwards *Alston* sells them to one *Marwood*, who brought a replevin against the plaintiff for taking of the sheep; and the officers, together with *Solebay* the defendant (who was

Trover will not lie against a *servant* for an unlawful intermeddling with the goods of any person by the command of his *master*, unless such intermeddling amount to a trespass; and then an action of trespass will lie against the servant, though done by the command of the master.—1. Roll. Abr. 5. 94. 1. Vern. 269. 8. Mod. 44. 272. 10 Mod. 25. 37. 110. 386. 141. 11. Mod. 66. 181. 12. Mod. 231. 309. 530. Stra. 65. 128. 505. 576. 651. 820. 1078. 1184. Ld. Ray. 62. 225. 264. 276. 739. Bunb. 67. 3. Wils. 146. Salk. 441. Stra. 151. 813. Bull. N. P. 47. 5. Bac Abr. 267. Gilb. Evid. 180. Cowp. 476.

Miaes against Solebay.

* servant to *Marwood)*, did by his order, and in assistance of the officers, drive the sheep to *Marwood's* grounds, where they left them. The plaintiff demands the sheep of *Solebay*, and upon his refusal to deliver them, brings this action against the servant.

The question was, Whether it would lie or not?

See Holliday v. Camsel, 1. Term Rep. 658. Horwood v. Smith, 2. Term Rep. 169.

It was urged at the bar, that the action would not lie against the defendant, because he had not the possession of the goods at the time of the action brought; for he presently put them into his master's ground: and it was said, if *A.* find goods and *S.* takes them away before the action brought, trover will not lie against *A.*; but it is otherwise if he sell them (*a*). In this case it would have been a breach of trust in the servant to have delivered the goods belonging to his master to another. It is true, if there be a conversion, though the possession be removed before the action brought, yet the action will lie, but that is because of the conversion. Many cases were put where the servant is not liable to an action for a thing done by the command of his master; and where a bailiff, who is but a servant to the sheriff, shall not be charged in a false return made by his master, *Cro. Eliz.* 181. So if a smith's man prick an horse, the action lies against the master and not against the servant.

1. Roll. Abr. 94, 95.

The Court before they delivered any judgment in this case premised these two things:

Pyne v. Dor, 1. Term Rep. 56. 2. Term Rep. 420.

First, That it is necessary in *trover* to prove a property in the plaintiff, and a trover and conversion in the defendant: and it was said by Atkins, *Justice*, but denied by the Chief Justice, that though goods are sold in a market, yet the property is not changed till the delivery, for which he cited *Keilway* 59. 77. But the Court held clearly in this case, that the first sale to *Alston* was defeated by the agreement of the parties afterwards; for when a bargain is made, and all the parties consent to dissolve it, and other conditions are proposed, the new agreement destroys the former bargain. And the Chief Justice said, that if a horse was bought in a market, for which the vendee is to pay ten pounds, if the ready money be not paid the property is not altered, but the party may sell him to another.

Hob, 41. Noy's Max. 42. 2. Bl. Com. 447.

Secondly, This new agreement, to have the sheep if *Alston* would pay such a sum of money at a future day, will not amount to a sale, and the new property is changed, and consequently the sale by *H.* to the plaintiff before the day is good, and so the property of the sheep is in him.

*[244] * But the whole Court were of opinion, that the action would not lie against the defendant.

Bodkin v. Powel, Co 476.

First, The defendant could be guilty of no conversion, the driving the cattle by virtue of the replevin would mak

(*a*) 1. Roll. Abr. 6. See also 1. Com. Dig. 221. (F.).

guilty;

guilty; but at that time the sheep were *in custodiâ legis*, and the law did then preserve them so that no property can be changed; and if so, then there could be no conversion. MIERS *against* SOLEBAY.

SECONDLY, The action will not lie against the servant; for it being in obedience to his master's command, though he had no title, yet he shall be excused. And this rule JUSTICE SCROGGS said would extend to all cases where the master's command was not to do an apparent wrong; for if the master's case depended upon a title, be it true or not, it is enough to excuse the servant; for otherwise it would be a mischievous thing, if the servant upon all occasions must be satisfied with his master's title and right before he obey his commands; and it is very requisite that he should be satisfied, if an action should lie against him for what he doth in obedience to his master. But it was said, the (*a*) servant cannot plead the command of his master in bar of *a trespass*. And it was likewise said, that in this case the driving of the cattle by the servant to the grounds of his master, or a stranger's helping to drive them without being requested, is justifiable.

THIRDLY, Because what was done by the defendant was done in execution of the process of the law, and he might as well justify as the officer; for if he forbid the defendant to have assisted him, yet his assisting him afterwards would not have made him guilty, because done in execution of the law. Cowp. 18.

FOURTHLY, Because it is not found that the servant did convert the sheep to his own use; for the special verdict only finds the demand and the refusal, which is no conversion; and though it is an evidence of it to a jury, yet it is not matter upon which the Court can give judgment of a conversion, 10 *Co.* 57.; and therefore the jury should have found the conversion as well as the demand and refusal, like the case in 2. *Roll Abr.* 693. In an assise of rent seck, upon *nul tort* pleaded, the jury found a demand and refusal, *et sic disseisivit*; it was held to be no good verdict, for the demand ought to have been found on the land, and shall not be so intended unless found. The plaintiff here hath set forth in his declaration a request to deliver; then a refusal and conversion too, which shews that they ought to be found, because distinct things; and the finding of the demand and refusal was only a presumptive, not a * conclusive proof of the conversion; and if the jury themselves know that there was no conversion, yet the plaintiff hath failed in his action: as if a trover be brought for cutting trees and carrying of them away, and the jury know that though the defendant cut them down, yet they still lay in the plaintiff's close, this is no conversion. And though it hath been strongly insisted at the bar, that the Court shall intend a conversion, unless the contrary appeared, and are to direct a jury to find the demand and refusal to be a conversion, and the opinion of DODDRIDGE and CROKE, in 1. *Roll. Rep.* 60. was much relied on, where *Adams* recovered

A special verdict in trover must expresly find the *conversion*. 2. Bulst. 313. 1. Roll. Abr. 5. 5. Bac. Abr. 312.

* [245]

1. Term Rep. 478.

(*a*) Wyne and Rider, antea, 67. 4. Bac. Abr. 258.

MILES *against* SOLIBAY.

against *Lewis* forty pounds in the Court of *Exon*, and three butts of sack were taken in execution, and the plaintiff deposited twenty-two pounds in the hands of the defendant to prevent the sale of the sack, which was to be a pledge to return it upon request, if the defendant was not paid before the next court day; the jury found the debt was not paid, and that no request was made to return the sack, but that the plaintiff requested the defendant to return the money; yet it was held by those two Justices, that the law would supply the proof of a conversion though it was not found, for it shall be presumed that the money was denied to the plaintiff, and that the defendant might use it himself; and because no other proof could be made, that very denial shall be a conversion in law *(a)*. So a denial of a rent seck after demand is a disseisin, much more in personal actions where the substance is found, it is well enough, 1. *Inst.* 282. a.

Gilbert's Evid. 258.

But THE COURT said, that notwithstanding this authority, they would not intend a conversion, unless the jury had found it *(b)*, especially in this case, because they ought to have found it to make the servant liable; for if the conversion was to the use of his master, there is no colour for this action to be brought against the defendant, but it ought to be brought against the master.

The Court will not grant a *new trial*, unless the party has a *new case*.

Whereupon a *venire facias de novo* was prayed to help the insufficiency of the verdict, the conversion not being found.—But THE COURT said, it was to no purpose to grant *a new trial*, unless the plaintiff had a new case.

Cowp. 601.

And so judgment was given for the defendant.

(a) 2. Bulst. 308. Cro. Eliz. 475. Gouldf. 152. Moor, 460. Stiles, 361. Plowd. 92. 1. Roll. Abr. 5. 10. Co. 56, 57.

(b) Hob. 181. 1. Roll. Rep. 131. 10. Co. 57. 1. Com. Dig. 220. (E.)

TRINITY

TRINITY TERM,

The Twenty-Ninth of Charles the Second,

IN

The Exchequer.

Sir William Montague, *Knt. Chief Baron.*

Sir Edward Turner, *Knt.*
Sir Edward Thurland, *Knt.* } *Barons.*
Sir Francis Bramſton, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

* [246]

* Bill *againſt* Nicholl,

Caſe 141.

A variance of *Gerrard* inſtead of *Gardiner* between the record pleaded and the record itſelf.

IN AN ACTION BROUGHT IN THE COURT OF EXCHEQUER, the defendant pleaded another action depending againſt him for the ſame matter in the COMMON PLEAS; and upon "*nul tiel record*" replied by the plaintiff, a day was given to bring in the record; and when it was brought in, it appeared that there was a variance between the record in the common pleas, as mentioned in the defendant's plea, and the record itſelf; for the defendant in his plea had alledged one *Gerrard* to be attorney inſtead of *Gardiner*, who was attorney upon record.

8. Mod. 1, 2. 243. 12. Mod. 91. 204. 214. 235. 307. 350. 599. Stra. 1131. Ld. Ray. 84. 152. Cowp. 229. Dougl. 194.

And, Whether this was a failure or not of the record? was the queſtion.

It was ſaid, *on the defendant's ſide*, that it was ſuch a variance, that it made it quite another action.

And *on the plaintiff's ſide* it was ſaid, that an immaterial variance will not prejudice where the ſubſtance is found, 7. *Hen.* 4. *pl.* 1. *Bro.* "*Failure*," *pl.* 2. 15.

CURIA *adviſare vult.*

Case 142.

Forest *Qui Tam against* Wire.

An action lies in the courts at *Westminster* upon the statute of 5. *Eliz.* c. 4. but not an *information*.

4. Inst. 172. Stiles, 383. Cro. Jac. 85. 378. Cro. Car. 112. 316. 1. Sid. 401. 3. Lev. 71. Carth. 465. Salk. 372, 373. *con.* Stra. 552. Ld. Ray. 373 See the case of Farrer *Qui Tam* v. Williams, Cowp. 359.; and Shipman v. Henbest, 4. Term Rep. 109.

DEBT upon the statute of 5. *Eliz.* c. 4. for using the trade of *a silk weaver* in *London*, not having been an apprentice seven years. The action was brought in this court, and laid in *London*, and tried by *nisi prius*, and a verdict for the defendant.

And now the plaintiff, to prevent the payment of *costs*, moved by MR. WARD against his own action, and said, that it will not lie upon this statute in any of the courts of *Westminster*; for it is not only to be laid (as here) in the proper county, but it is to be brought before the justices in their sessions; and this is by force of the statute made 31. *Eliz.* c. 4. and 21. *Jac.* c. 4. which enacts, "That all informations upon penal statutes must be "brought before the justices of the peace, in the county where "the fact was committed."

But THE COURT were clear of opinion, that the *action* may be brought in any of the courts of *Westminster*, who have a concurring jurisdiction with the justices; and so they said it hath been often resolved.

* [247]

Case 143.

* THE ATTORNEY GENERAL *against* Alston.

Where the king's title is not precedent to that of the *terre-tenant*, the lands of his receiver shall not be liable by the statute of the 13. *Eliz.* c. 4.

2. Vern. 389. Gilb. Eq. Rep. 220. Fitzg. 90. 290. Stra. 749. 978. Ld. Ray. 244. 766. 849.

AN INQUISITION UPON AN ACCOUNT STATED went out to enquire what lands one *Havers* had in the twentieth year of this king, or at any time since, he being the receiver-general in the counties of *Norfolk* and *Huntingdon*.

THE JURY found that he was seised of such lands, &c. Whereupon *an extent* goes out to seize them into the king's hands, for payment of eleven hundred pounds which he owed to the king.

Alston, the terre-tenant, pleads, that *Havers* was indebted to him, and that he was seised of those lands in the twentieth year of *Charles the First*, which was before the debt contracted with him, and that he became *a bankrupt* likewise before he was indebted to the king, and thereupon these lands were conveyed to the defendant by assignment from the commissioners of bankruptcy, for the debt due to him from *Havers*, ABSQUE HOC that he was seised of these lands at the time he became indebted to the king.

THE ATTORNEY GENERAL *replies*, That he was seised of these lands before the commission of bankruptcy issued, and before he became a bankrupt, and that at the time of his seisin he was receiver, and accountable for the receipt to the king; and being so seised in the twentieth year of this present king, he was found in arrear eleven hundred pounds; for the payment whereof he was chargeable by the statute of the 13. *Eliz.* c. 4. which subjects all the lands of a receiver which he hath or shall have in him during the time he remains accountable: and so prays that the king's hands may not be amoved: to this the defendant demurred.

SAWYER,

The Attorney General v. Alston.

Sawyer, *for the defendant*, held, that the replication was ill both in form and ſubſtance.

First, It doth not appear that the defendant continued receiver from the time he was firſt made, as it ought to be, or elſe that he was receiver during his life; for if a man is receiver to the king, and is not indebted, but is clear, and ſells his land, and ceaſes to be receiver, and afterwards is appointed to be receiver again, and then a debt is contracted with the king, the former ſale is good.

Secondly, The replication is a departure from the inquiſition, which is the king's title; for the lands of which enquiry was to be made, were ſuch which *Havers* had in the twentieth year of *Charles the Second*, and the defendant ſhews that *Havers* was not then ſeiſed thereof, but makes * a good title to himſelf, by indenture of bargain and ſale made to him by the commiſſioners of bankruptcy, and ſo The Attorney General cannot come again to ſet up a title precedent to the defendant, for that is a departure; it is enough for the defendant that he hath avoided the king's title, as alledged; and though Mr. Attorney is not bound to take iſſue upon the traverſe, yet he cannot avoid waving both the title of the defendant and the king, by inſiſting upon a new matter. [248]

It was agreed, That the king had two titles, and might either have brought his inquiſition grounded upon the debt ſtated, or upon the ſtatute of the 13. *Eliz.* c. 4. upon *Havers* becoming receiver; but when he hath determined his election, by grounding it upon the debt ſtated, he cannot afterwards have recourſe to the other matter, and bring him to be liable from the time of his being receiver: as if an inquiſition go to enquire what lands the debtor of the king had ſuch a day when he entered into a bond, if there be an anſwer given to that, Mr. Attorney cannot afterwards ſet up a precedent bond, becauſe it is a departure, and the ſtatute itſelf veſts no eſtate in the king, but makes the receiver's lands liable as if he had entered into a ſtatute ſtaple. The inquiſition, therefore, ſhould have been grounded upon the ſtatute, and then the defendant might have pleaded the act of indemnity, of which he might have the benefit; but if not, he may be let into the equity of the ſtatute of the 33. *Hen.* 8. c. 39. which gives liberty to purchaſers to have contribution, and to plead ſufficient matter, if they have any, in diſcharge of the debt.

But *on the other ſide* it was ſaid, that the replication was good, for if the ſale was after his being receiver, though before he became indebted, yet by the ſtatute of the 13. *Eliz.* c. 4. the lands are ſubject to a debt contracted afterwards, becauſe it hath a retroſpect to the time he was firſt receiver. By the common law both the body and lands of the king's debtor were liable from the time he became indebted; but becauſe ſuch debtors oftentimes ſold thoſe lands which they had whilſt they were officers, and ſo the king was defeated, therefore was this ſtatute made to ſupply that defect of the common law, by which ſtatute all the lands he had at any time

Pl. Com. 321. Dyer, 160.

THE ATTORNEY GENERAL *against* ALSTON.

time during his continuance in the office were made liable. And though it may be objected, that becauſe of this inquiſition the king is limited to a time, *viz.* that enquiry ſhould be * made what lands *Havers* had in the twentieth year of the king, yet it was ſaid the enquiry may be general. The *elegit* anciently left out the time, becauſe the law doth determine from what time the party doth become liable; ſo that the queſtion is about the king's title, which if it appear to precede that of the terre-tenant, then the king's hands are not to be amoved; and thereupon judgment was prayed for him, *Bro.* "*Prerogative*," 59.

CURIA *adviſare vult.*

TRINITY TERM,

The Twenty-Ninth of Charles the Second,

IN

The Common Pleas,

Sir Francis North, *Knt. Chief Justice.*

Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.* } *Justices.*
Sir William Scroggs, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Barker *against* Keat.

Case 144.

A SPECIAL VERDICT IN EJECTMENT.—The jury made a special conclusion by referring to the Court, Whether there was a good tenant to *the præcipe* or not, which was made by a *bargain and sale*, but no money paid, nor any rent reserved but that of *a pepper-corn*, to be paid at the end of six months, upon demand, and the release and grant of the reversion thereupon was only " for divers *good* considerations."

The reservation of a *pepper-corn* is a good consideration to raise an use to make a tenant to the *præcipe.*

S. C. 1. Mod. 262.
S. C. 2. Vent. 35.
S. C. 1. Freem. 249.
Co. Lit. 46. b.
Lit. sect. 465.
Jones, 7.
5. Co. 124.
1. Cro. 110.
Cro. Jac. 604.
1. Leon. 194.

The question was, If this lease, upon which no rent was reserved but that of *a pepper-corn*, be executed by the statute 27. *Hen.* 8. c. 10. of Uses or not? If it be, then there is no need of *the entry* of the lessee, for the statute will put him in actual possession, and then the inheritance, by the release or grant of the reversion, will pass. But if this lease be not within the statute, because no use can be raised for want of a consideration, then it must be a conveyance at the common law, and so the lessee ought to make *an actual entry*, as was always usual before the making of the statute.

Comyns, 119. 10. Mod. 45. 533. 11. Mod. 181. 196. 210. 12. Mod. 160. Stra. 934. Cruise on Recov. 90. Sanders on Uses, 443. 451. 469. 3. Bac. Abr. 436.

BARKER against KIAT.

WALLER and MAYNARD, *Serjeants*, argued, that here was no consideration to raise an use, for the reservation of a pepper-corn is no profit to the lessor; it is not a real and good rent, for so small and trivial a matter is no consideration; for that which must be a good consideration ought to be money, or some other valuable thing.—SECONDLY, Then this conveyance is not executed by the statute of Uses; and if so, it is not good at the common law, it being only a lease for years, and no entry, without which there can be no possession; and if not, then there can be no reversion upon which the release may operate, it is only an *interesse termini*; and so was the opinion of my *Lord Coke (a)* since the mak-
* [250] ing of this statute. * And that no *use* was raised here, the case of
1. Leon. 194, 195. my *Lord Paget* was cited, to which this was compared: my lord, being seised in fee, covenanted to stand seised to the use of *Trentham* and others, in consideration of payment of his debts out of the profits of his own estate; this was adjudged a void use, because there was no consideration on *Trentham's* part to raise it, the money appointed to be paid being to be raised out of the profits of my lord's estate. The words of the lease are "demise, grant, &c." which are words at the common law, *Co. Lit.* 45. b. and it is not possible that a future executory consideration should raise a present use, for the pepper-corn is not to be paid till the end of six months; and as this consideration is executory, so it is contingent too, for the lessor might have released before the expiration of the six months. If the case of *Lutwich v. Mitton (b)* be objected, where it was resolved by the two Chief Justices and Chief Baron, that upon a deed of bargain and sale of lands, where the bargainee never entered, and the bargainor, reciting the lease, did grant the reversion expectant upon it, that this was a good grant of the reversion, from which the possession was immediately divided, and was executed and vested in the bargainee by virtue of the statute of Uses; this is no objection to the purpose, because in that case the bargainor was himself in actual possession: so that if there be no good tenant to *the præcipe* in this case, though all that join in it are *estopped* to say so, yet the tenant in tail, who comes in above, is not barred, 5. *Hen.* 5. *pl.* 9.

Co. Lit. 301
3. Bac. Abr. 420.

Cro. Car. 110. 400.

But *on the other side* it was said, that the lessee was in possession by the statute; for the word "grant" being in the lease, and the reservation being *a pepper-corn*, that will amount to a *bargain and sale*, though it hath not those precise words in it, 8. *Co.* 94. But if it should not, yet another use may be averred than what is in this lease; like *Bedel's Case*, 7. *Co.* 40. b. where a man, in consideration of fatherly love to his eldest son, did covenant to stand seised to the use of him in tail, and afterwards to the use of his second son; there, though the consideration respected his eldest son only in words, yet a consideration which is not repugnant to it may be averred; and though an entry is not found, yet it shall not be intended, since the jury have not found the contrary.

Pl. Com. 308.
Dyer, 146. b. contra.
9. Mod. 83. 132.
10. Mod. 533.
11. Mod. 96. 252. 181.
12. Mod. 101. 1604
Ld. Ray. 8

(a) Co. Lit. 270.

(b) Cro. Jac. 604.

NORTH,

* NORTH, *Chief Justice*. At first when this sort of conveyance was used, the lessee upon the lease for a year did always make an actual entry, and then came the release to convey the reversion; but that being found troublesome, the constant practice was to make the lease for a year, by the deed of bargain and sale, for the consideration of five shillings, or some other small sum; and this was held, and is so still, to be good without any actual entry, and the bargainee thereby is capable of a release (though he cannot bring an action of trespass without entry); for when money is the consideration of making the bargain and sale, it is executed by the statute of Uses, and so the release upon it is good; but if the deed be not executed, it is otherwise.

BARKER *against* KEAT.

Cro. Jac. 604. 2. Vern. 519. 10. Mod. 265. Stra. 1086. 1128. Ld. Ray. 166. 799. 853. 3. Bac. Abr. 437.

But this being to support a common recovery, was to be favoured (*a*); and therefore the Court took time to consider till the next Term; and then

NORTH, *Chief Justice*, said, That if a real action be brought against *A.* who is not tenant to *the præcipe*, and a recovery be had against him, the sheriff can turn him out who is in possession; but if he who is not in possession come in by *voucher*, he is *estopped* to say afterwards that he was not party to the writ, so that he who is bound must be tenant or vouchee, or claim under them. Conveyances have been altered, not so much by the knowledge of the learned, as by the ignorance of unskilful men in their profession. The usual conveyance at common law was by feoffment, to which livery and seisin were necessary, the possession being given thereby to the feoffee; but if there was a tenant in possession, and so livery could not be made, then the reversion was granted, and the particular tenant always attorned: and upon the same reason it was that afterwards a lease and release was held a good conveyance to pass an estate; but at that time it was made no question but that the lessee was to be in actual possession before the release. Afterwards uses came to be frequent, and settlements to uses were very common, by reason whereof many inconveniencies were introduced; to prevent which the statute of 27. *Hen.* 8. c. 10. was made, by which *the use* was united to *the possession*; for before that statute uses were to be executed according to the rules of equity, but now they are reduced to the common law, and are of more certainty, and therefore are to be construed according to the rules of law. * At the common law, when an estate did not pass by feoffment, the lessor or vendor made a lease for years, and the lessee actually entered, and then the lessor granted the reversion to another, and the lessee attorned, and this was good. Afterwards, when an inheritance was to be granted, then also was a lease for years usually made, and the lessee entered as before, and then the lessor released to him, and this was good. But after the statute of Uses it became an opinion, That if a lease for years was made upon a valuable consideration, a release might operate

Antea, Lord Salisbury's Case.

Ld. Ray. 291.

* [252]

Cro. Car. 109.

(*a*) See the case of Addison *v.* Otway, ante. 237.

upon

BARKER *against* KEAT. upon that without an actual entry of the lessee, because the statute did execute the lease, and raised an use presently to the lessee. SIR FRANCIS MOOR, *Serjeant at Law*, was the first who practised this

4. Bac. Abr. 277. 2. Bl. Com. 339. NOTA. way. But because there were some opinions, that where conveyances may enure two ways, the common law shall be preferred, unless it appear that the party intended it should pass by the statute, thereupon the usual course was to put the words "bargain "and sale" into the lease for a year, to bring it within the statute, and to alledge that the lease was made to the intent and purpose that by the statute of Uses the lessee might be capable of a release;

2. Bl. Com. 339. but notwithstanding this, MR. NOY was of the opinion, that this conveyance by *lease and release* could never be maintained without the *actual entry* of the lessee. This case goes farther than any that ever yet came into judgment, for money is not mentioned here to be the consideration, or any thing which may amount to it, unless *the pepper-corn*, which he held to be a good considera-

2. Ld. Ray. 801. tion. The lease and release are but in nature of one deed, and then the intent of the parties is apparent that it should pass by the statute, and *eo instanti* that the lease is executed, the reservation is in force. The case put by *Littleton* in *Sect.* 459. is put at the common law, and not upon the statute; where he saith,

Cro. Car. 110. 10. Mod. 436. 12. Mod. 11. That if a lease be made for years, and the lessor releaseth all his right to the lessee before entry, such release is void, because the lessee had only a right, and not the possession, which my LORD COKE, in his comment upon it, calls an *interesse termini*, and that such release shall not enure to enlarge the estate without the possession, which is very true at the common law, but not upon the statute of Uses.

*[253] * And therefore judgment was given by THE WHOLE COURT, that the word "grant" in the lease will make the land pass by way of *use*; that the reservation of *a pepper-corn* was a good consideration to raise an use to support a common recovery; that this lease being within the statute of Uses, there was no need of an *actual entry* to make the lessee capable of the release; for by virtue of the statute he shall he adjudged to be in actual possession, and so a good tenant to *the præcipe*. And judgment was given accordingly in *Michaelmas Term* following.

See 14. *Geo.* 2. c. 20.

Case 145. Kendrick *against* Bartland.

Continuando laid after a nuisance abated, yet damages shall be recovered for what was done before.

THE PLAINTIFF brought an action on the case for stopping the water going to his mill, with a *continuando, &c.* The defendant pleads, that the stopping was *contra voluntatem*, and that *tali die*, which was between the first and the last day laid in the *continuando*, the plaintiff himself had abated the nuisance, and so he had no cause of action. To this plea the plaintiff demurred.

C. 1. Freem. 230. 1. Sid. 319. Cro. Jac. 207. 618. 11. Mod. 258. 12. Mod. 24. 127. 131. 9. 635. 640. Stra. 1036. 1095. 1140. Ld. Ray. 240. 803. 823. 974. 977. 1126. 1382. Bac. Abr. 215.

BALDWYN,

Baldwyn, *Serjeant*, who argued to maintain the plea, did not rely upon that part of it where the defendant saith, that the stopping of the water was involuntary, because he doing the thing it could not be *contra voluntatem*; but the question would be, Whether the plaintiff had any cause of action to recover damages after the abatement of the nuisance? and he said, that he had abated it before the action brought, and counted for damages after the abatement, for which he had no cause of action, and this he had confessed by his demurrer.

Kendrick *against* Bartland.

But the Court were of opinion, that it was not a good plea, and took this difference between a *quòd permittat* or *an assise* for a nuisance, and an action on the case for the same; for the end of a *quòd permittat* or an assise was to abate the nuisance, but the end of an action on the case was to recover damages; therefore, though the nuisance was removed, the plaintiff is intitled to his damages that accrued before; and it is usual in actions of this nature to lay the *continuando* for longer time than the plaintiff can prove, but he shall have damages for what he can prove, and so here he shall recover the damages which he sustained before the abatement.

And thereupon judgment was given for the plaintiff. *

*[254]

* Walwyn *against* Awberry and Others. Case 146.

TRESPASS for the taking and carrying away of four loads of wheat, and four loads of rye, &c. The defendants justify, For that the plaintiff is rector of the rectory impropriate of *B.* and that the chancel was out of repair, and that the *Bishop of Hereford*, after monition first given to the plaintiff, had granted a sequestration of the tythes of the rectory for the repairing the chancel; and that the defendants were churchwardens of the parish; and that the particulars mentioned in the declaration were tythes belonging to the plaintiff as rector aforesaid; and that by virtue of the said commission they took the same for repairing of the said chancel, and that for these tythes so taken they had accounted to the bishop. To this the plaintiff demurred.

Tithes of a rectory shall not be *sequestered* for repairs of the chancel.

S. C. 1. Mod. 258.
S. C. 2. Vent. 35.
S. C. 1. Freem. 230.
Cro. Eliz. 434.
2. Stra. 1145.
Ld. Ray. 59. 512.
1. Vern. 160. 247. 421.
1. Peer. Wms. 307. 535.
2. Peer. Wms. 261. (621).
3. Peer. Wms. 240. 379.
Cases Temp. Talb. 22. 217.
1. Vezey, 180.
Bunb. 272.

The question was, Whether *an impropriate rectory* be chargeable for the repairs of the chancel by the sequestration of the tythes by the bishop?

Those who argued in the negative for the plaintiff could not deny, but that church reparations did belong to the ecclesiastical courts, and that as often as prohibitions have been prayed to that jurisdiction, consultations have been as often granted; notwithstanding in many cases the rates for such reparations have been very unequally imposed; and the reason is, because those courts have original jurisdiction of the matter. It was admitted also, that parishioners are bound to repair the church, and the rector the chancel, and this in respect of their lands; and therefore if a man hath lands in one town and dwell in another, he shall be contributory

WALWYN *against* AWBERRY AND OTHERS.

to the reparation of that church where his lands are, and not where he inhabits; and that all this was by the common custom of *England* long before the making of the statute of 31. *Hen.* 8. c. 13. by which parsonages were made lay fees. But then it must be understood, that this was no real duty incumbent upon them, but was a personal burthen, for which every parishioner was chargeable proportionably to the quantity of land which he held in the parish; in which case if he refused to be contributory, the ordinary did never intermeddle with the possessions, but always proceeded by ecclesiastical censures, as excommunication of the party re-

*[255] fusing; which is the proper remedy. * But in case of an appropriation in the hands of an ecclesiastical corporation, as dean and chapter, &c. there, if a refusal be to contribute to the repairs, the ordinary may sequester; and the reason is, because a corporation cannot be excommunicated. The ordinary may also sequester in things of ecclesiastical cognizance, as if the king do not present; so he may take the profits within the six months that the patron hath to present, and apply them to the pastor of the church by him recommended, because the ordinary hath a provisional superintendency of the church; and there is a necessity that the cure should be supplied until the patron doth present, and this is a kind of sequestration. But in some cases the ordinary could not sequester the profits belonging to spiritual persons, though he was lawfully entitled to them for a particular time and purpose: for by the statute of 13. *Eliz.* c. 20. it is enacted, "That if a parson "make a lease of his living for a longer time than he is resident "upon it, that such lease shall be void, and he shall for the same "lose one year's profits of his benefice, to be distributed by the "ordinary amongst the poor of the parish." Now he had no remedy to recover the year's profits but in the ecclesiastical court; he could not sequester; and to give him authority so to do, a supplemental statute was made five years afterwards, in the eighteenth year of the queen's reign (*a*), by which power is given him to grant a sequestration; so that if he could not sequester in a case of which he had a jurisdiction by a precedent statute, *à fortiori* he cannot in a case exempted as this is from his jurisdiction. But admitting a sequestration might go, then this inconveniency would follow, that if other lands should be sequestered for the same purpose, the former sequestration could not be pleaded to discharge them, because the interest is not bound thereby, no more than a sequestration out of chancery is pleadable to an action of trespass at the common law. This case cannot be distinguished from that of *Jefferies* in 5. *Co.* and from what the civilians testified to the court there, *viz.* That the churchwardens and greater part of the parishioners, upon a general warning given, may make a taxation by law, but the same shall not charge the land, but the person in respect of his land; so that it is he that is chargeable and may be excommunicated in case of refusal to contribute, but his lands cannot be sequestered,

(*a*) 18. *Eliz.* c. 11.

because

because it is not the business of the ordinary to meddle with the temporal possessions of lay-men, but to proceed against them by ecclesiastical censures; and the parishioners * lands may be as well sequestered for the repairs of the church, as the lands of the impropriator for the repairs of the chapel; for which reasons it was held, that a sequestration would not lie.

WALWYN *against* AWBERRY AND OTHERS.

But *on the other side* it was said, that before the making of the statute the rector was to repair the chancel under pain of sequestration, which the ordinary had power to grant in case of refusal; and that his authority in many cases was not abridged by the statute. The case of *Parry v. Banks (a)* was cited, where in the twenty-fourth year of *Henry the Eighth* a parsonage was appropriated to the deanery of *St. Asaph*, and a vicarage endowed, which the bishop dissolved in the twenty-fourth year of *Queen Elizabeth*; and *Parry*, pretending that notwithstanding this dissolution it was in the king's hands by lapse, obtained a presentation: and it was resolved, that after the statute of Dissolutions, which made parsonages lay fees, the ordinary could not dissolve the vicarage where the parsonage was in a temporal hand, but being in that case in the hands of the dean he might. The rector is to repair the chancel because of the profits of the glebe, which is therefore *onus reale impositum rebus et personis*; and of that opinion was JOHN DE ATKIN, who wrote one hundred years before LYNDWOOD, where in *fol.* 56. he saith, That if the chancel be out of repair, it affects the glebe. And that the constitution of the canon law is such Vaugh. 327. will not be denied; and if so, canons, being allowed, are by use become parcel of the common law, and are as much the law of the kingdom as an act of parliament; for what is law doth not *suscipere magis aut minus.* Several cases were put where the bishop doth intermeddle with the profits of a parsonage; as in the case of a sequestration upon a judgment obtained against a spiritual person, where a *fieri facias* is directed to the sheriff upon that judgment, and he returns *clericus beneficiatus non habens laicum feodum*; for which reason he cannot meddle with the profits of the glebe; but the bishop doth it by a sequestration to him directed. He may likewise retain for the supply of the cure, and pay only the residue; which hath been omitted on the other side. As the ordinary might dissolve a vicarage endowed where the parsonage was in the hands of a dean, so he may sequester an appropriation in any spiritual person; and there is no statute which exempts an impropriation from such a sequestration, because it is *onus reale* at the common law; and as the lay impropriator may sue for tithes and receive them as before the making * this statute, [257] it is as reasonable, since he hath the same advantage, that he should have the same charge; and the rather, because the saving in the statute of 31. *Hen.* 8. c. 13. doth still continue the same authority the bishop had before, though the possession was thereby given to the king: the words of which are, *viz.* " saving to all and

(a) Cro. Jac. 518.

WALWYN against AUBREY AND OTHERS

"every person, &c. such right which they might have had as if the "act had not been made," which must be the right of the ordinary, and of no other person. An impropriator pays *synodals* and *procurations* as well as an appropriation in the hands of ecclesiastical persons, and it would be very inconvenient if a sequestration should not lie, which would quicken them more than an excommunication; and it was said, that in *England* there were about a thousand appropriations belonging to corporations aggregate, as deans and chapters, which could not be excommunicated; and if the bishop could not sequester, then there was no remedy to repair the chancel: for which reasons judgment was prayed for the defendant.

But THE WHOLE COURT, except ATKINS, *Justice*, held, that the lay impropriation was not to be sequestered for the repairs of the chancel.

And THE CHIEF JUSTICE said, that the repair of the chancel was an ecclesiastical cause, but that the rectory and impropriator were lay, and not to be sequestered, as the possessions in the hands of ecclesiastical corporations may, which he did agree could not be excommunicated, but the persons who made up such corporation might. And as to the sequestration upon a judgment, it made nothing for the matter to entitle the ordinary to a sequestration in this case, because what he doth in that is in the nature of a temporal officer; for the sequestration is like the *fieri facias*, and being directed to the bishop, he is in that case (if he may be so called) an ecclesiastical sheriff, and by virtue thereof may do as the sheriff doth in other cases, that is, he may seize ecclesiastical things and sell them, as the sheriff doth temporal things upon a *fieri facias*; but it is to be observed, that he must return *fieri feci*, and not *sequestrari feci*, upon this writ. And as to the saving in the statute, that doth not alter the case; for if any right be thereby saved it is that of the parson, for the parishioners have no right to sit there; indeed the vicar may, because he comes in under the parson. So that this case is not to be put as at the common law, but upon the statute of Dissolutions, by virtue whereof the * rectory, being in the hands of a lay person, is become a lay fee, and so cannot be subject to a sequestration; if it should, the next step would be, that the bishop would increase vicarages as well in the case of an *impropriation* as *appropriation*, which would lessen the possessions of such as have purchased under the act.

2. Roll. Abr. 474
2. Inst. 472.

* [258]

But ATKINS, *Justice*, was of a contrary opinion. He said, that it was agreed by all, that an impropriator is chargeable with the repairs of the chancel; but the charge was not personal but in regard of the profits of the impropriation, which are originally the debtor, according to the first donation. That the primary rights of rectories are, the performance of divine service and the repairs of the chancel; and that the profits which are over and above must then go to the impropriator, and are to be esteemed then a lay fee; but that those duties are the first rights,

and

and therefore must be first discharged. That this right, this duty of repairing was certain, and therefore shall not be taken away by implication, but by express words in the act, which if wanting shall remain still, and the parties shall be compelled to repair under the same penalties as before. But admitting it should be taken away, yet the saving in the act extends to the right of the parishioners, which is not to sit in the chancel, but to go thither when the sacraments are administered, of which they are deprived when it is out of repair; nor can they have the use of the church, which properly belongs to them, because when the chancel is out of repair, it not only defaces the church, but makes it in a short time become ruinous. He denied that a sequestration in *Chancery* cannot be pleaded to bar a trespass at the common law; for if it be said that the *Chancery* have issued such sequestrations, it will be as binding as any other process issuing according to the rules of the common law. And he also denied the case put by THE CHIEF JUSTICE, that the lands of the parishioners might as well be sequestered for the repair of the church as those of the impropriator for repair of the chancel, because the profits of the rectory might originally be sequestered, but the lands of the parishioner could not; and so the cases are quite different.

WALWYN *against* AWBERRY AND OTHERS.

But in *Easter Term* following judgment was given against the defendant upon the point of pleading, which THE COURT all agreed to be ill. * FIRST, The defendants should have averred that the chancel was out of repair (*a*). SECONDLY, That no more was taken than what was sufficient for the repair thereof (*b*). THIRDLY, For that the plaintiff had declared for the taking of several sorts of grain; and the defendant justifies the taking but of part, and saith nothing of the residue (*c*), and so it is *a discontinuance*; and the general words *quoad residuum transgressionis* will not help, because he goes to particulars afterwards and doth not enumerate all. * [259]

And thereupon judgment was given accordingly.

(*a*) 1. Vent. 35. 11. Mod. 219. 12. Mod. 421. 539.
(*b*) 1. Mod. 261. 178. 66. Stra. 302. Ld. Ray. 1221.
(*c*) 8. Mod. 120. 218. 10. Mod. 212. 4. Bac. Abr. 141.

Edwards *against* Weeks. Case 147.

ASSUMPSIT.—The plaintiff declared, that the defendant, in consideration that the plaintiff at his request had exchanged horses with him, promised to pay him five pounds; and he alledged a breach in the non-performance. The defendant pleads, that the plaintiff, before any action brought, discharged him of his promise.

And upon a demurrer the question was, Whether after a breach of a promise a parol discharge could be good? The case of

In *assumpsit* on a promise to pay five pounds in consideration of exchanging horses, the defendant cannot plead a *parol discharge* before action brought; for the money being due immediately, the promise to pay was broken.—S. C. 1. Mod. [illegible]. S. C. 1. Freem. 250. 1. Roll. Abr. [illegible]. [illegible] Sid. [illegible]. Cro. Jac. [illegible]. 620. 3. Lev 244. Ante, 44. 12. Mod. 538. Stra. 873. Ld. Ray. 387. 666. 4. Mod 250. 1. Com. Dig. 151. 4. Bac. Abr. 265.

EDWARDS *against* WEEKS.

Langden v. Stokes (*a*) was an authority that ſuch a diſcharge had been good before the breach, *viz.* The defendant promiſed to go a voyage; the breach was alledged in non-performance; and the defendant pleaded, that before any breach the plaintiff *exoneravit eum*; and upon demurrer it was held good before the breach. But here was no time agreed for the payment of this five pounds, and therefore it was due immediately upon requeſt; and not being paid, the promiſe is broken, and the parol diſcharge cannot be pleaded.

And of that opinion was ALL THE COURT, and judgment for the plaintiff, *niſi*, &c.

Quære, If he had pleaded ſuch a diſcharge before any requeſt of payment, whether it had been good?

(*a*) Cro. Car. 383. 1. Sid. 293.

TRINITY TERM,

The Twenty-Ninth of Charles the Second,

IN

The Exchequer.

Sir William Montague, *Knt. Chief Baron.*

Sir Edward Turner, *Knt.*
Sir Edward Thurland, *Knt.* } *Barons.*
Sir Francis Bramston, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

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* [260]

Arris and Arris *against* Stukely. Case 148.

INDEBITATUS ASSUMPSIT for two hundred pounds in money had and received to the use of the plaintiffs: Upon *non assumpsit* pleaded, the jury find a special verdict to this effect, *viz.* That king *Charles the Second* did, on the 17th day of *August* in the twelfth year of his reign, by his letters patents under the great seal, grant to the defendant and another the office of comptroller of the customs at the port of *Exeter durante bene placito*; that the other person died; and that the king afterwards, by other letters patents bearing date the first day of *May* in the twenty-first year of his reign, did grant the said office to the plaintiffs, which was two years before this action brought; and that the defendant still and for seven years past had exercised the same upon pretence of a right by survivorship, and received the profits thereof. But whether upon the whole matter the defendant made any such promise as in the declaration, they did not know; *et petunt advisamentum Curiæ in præmissis*; and if upon the matter so found the Court shall be of opinion that the defendant made such promise, then they say that he did make such promise, and assess damages *occasione præmissorum in narratione mentionat. ad* 190l. and costs to 53s. and 4d. &c.

If the office of comptroller of the customs, or any other office of trust, be granted by patent to two persons *durante bene placito*, the patent is determined by the death of one of the grantees.

S. C. 1. Danv. 27.
2. Lev. 245.
1. Freem. 473.
2. Jones, 126.
2. Show. 21.
Plow. 502.
Hob. 146.
2. Roll. Abr. 193.
Cases Temp. Talb 97. 127. 140. 143. 8. Mod. 12. 19.

ARRIS AND ARRIS *against* STUKELY.

WINNINGTON, *Solicitor General*, argued, That the first patent was determined by the death of one of the patentees, and then the second patent takes effect, and so the plaintiffs have a good title; for there shall be no survivorship of an office of trust, no not if the office had been granted to two for their lives, if it be not said "to the survivor of them," 11. *Co.* 34. *Auditor Curle's Case.*

And of that opinion was THE COURT clearly.

*[261]

A grant from *the crown* of the office of comptroller of the customs *durante bene placito* with a general *non obstante* of all statutes, was good; for the king might have dispensed with the statute 14 *Rich.* 2. c. 10. which enacts that no such office shall be granted for life.

T. Jones, 117. 128. Dyer, 352. Co. Eliz. 513. Co. Lit. 99. Plowd. 502. Dyer, 269. 2. Hawk. P. C. 552.

POLLEXFEN, *for the defendant*, said, he agreed that point; but that the plaintiff's patent was not good; for though there be a general *non obstante* of all the statutes in it, yet there ought to have been one in particular against the statute of 14. *Rich.* 2. c. 10. which enacts, "That no customer or comptroller shall "have any office in the customs for his life, but only during the "pleasure of the king;" which being made for the public good, the king cannot by any *non obstante* dispense with it. * In many cases the dispensation of the king by a *non obstante* is good; as where a statute prescribes the form of the king's grant, where it doth not directly prohibit a thing, but only under pain of a forfeiture; but if it be direct and *pro bono publico*, there a *non obstante* is not good; and so is this statute. He cannot dispense with the statute of 31. *Eliz.* c. 6. against simony; for the party being disabled by an act of parliament, cannot be enabled by a *non obstante* (*a*). He cannot dispense with the statute of Leases of Ecclesiastical Persons (*b*), nor with the jurisdiction of the admiralty encroaching upon the common law (*c*); for the foundation of a *non obstante* is in the king's prerogative, and is current in his grants; but in those statutes the subject hath an interest. The laws concerning *non obstantes* are none of the ancient laws of this land, but brought in by THE POPE (*d*). The Year-Book of 2. *Hen.* 7. f. 6. b. and 7. did first give rise to this exorbitant power; yet it is not the opinion of all, or indeed of any of the Judges then, as it is affirmed to be; for *Broke*, "*Pat.*" 45. 109. who abridged that case, took no notice of any opinion of the Judges: yet some grounding themselves on that book affirm, that the king may dispense with the statute of the 23. *Hen.* 6. c. 8. which enacts, "That no man shall be sheriff for above one "year;" and that therefore a patent granted by *Edward the Fourth* to the *Earl of Northumberland*, to be sheriff of the same county for life, was held good; which is a plain mistake; for there never was any such resolution, neither did the Judges make any determination upon that statute; it was only a discourse *obiter* by RADCLIFF, who was then one of the Barons of the exchequer, concerning the statutes of the 14. *Edw.* 3. c. 7. and of the

(*a*) Hob. 57. Co. Lit. 120.
(*b*) 5. Co. 15.
(*c*) 13. *Rich.* 2. c. 3. 15. *Rich.* 2. c. 5. 2. *Hen.* 4. 11. 4. Inst. 153.
(*d*) Davis's Rep. 69, 70, 71. Vaugh. 332. Thomas *v.* Sorrel, Hob. 146. Colt *v.* Glover, Long Quinto *Edw.* 4. pl. 33, 34. Broke, "Patent," 109. 8. Mod. 8, 12 19, 105.

42. *Edw.* 3.

42. *Edw.* 3. c. 9. which are only prohibitory, "That no ſheriff "ſhall continue in his office above one year," but have not any ſuch clauſe in them as the ſtatute 23. *Hen.* 6. c. 8. hath, which ſaith, "That all patents made to any to be ſheriff for above "a year ſhall be void, any clauſe or word of *non obſtante* in any-"wiſe put in ſuch patent notwithſtanding." This was the miſtake of BARON RADCLIFF, who upon a ſudden diſcourſe thought there might be ſuch clauſes in thoſe former ſtatutes of *Edward the Third*; and that notwithſtanding which, there being a *non obſtante* in that patent to thoſe ſtatutes, he held that to be a good diſpenſation of them. But it is plain there are no ſuch clauſes in thoſe ſtatutes; and therefore a *non obſtante* to them is good, and which was the true reaſon why that patent in *Henry the Seventh*'s time was held good. * Another reaſon might be, becauſe the office of ſheriff was grantable for life, and ſo not within the reach of the prohibition by thoſe ſtatutes. But if it was, yet the proviſo in the act of reſumption of 1. *Hen.* 7. c. . protected that patent, by which the king reſumed all grants made by *Edward the Fourth*, but provides for the earl's grant. But admitting the ſtatute of 14. *Rich.* 2. c. 10. and of 23. *Hen.* 6. c. 8. may be diſpenſed withal in this caſe, yet it ſhould be more particular than in this patent to the plaintiff; for *non obſtante aliquo ſtatuto*, generally, will not ſerve.

ARRIS AND ARRIS *againſt* STUKELY.

Poſtea, 300. 4. Bac. Abr. 177.

* [262]

T. Jones, 117. 128. Dyer, 352. a. 2. Roll. Abr. 193. Cro. Eliz. 513.

But SAWYER, *on the other ſide*, ſaid, that this *non obſtante* was good; for where an act of parliament comes to reſtrain the king's power and prerogative, it was always held ſo to be. And he relied upon the judgment of 2. *Hen.* 7. *pl.* 6. that the king might diſpenſe with the ſtatute 23. *Hen.* 6. c. 8. which he affirmed to be the conſtant uſage ever ſince; and that therefore the law is ſo taken to be at this day.

THE COURT held, that the king might diſpenſe with this ſtatute; for the ſubject had no intereſt, nor was in anywiſe concerned, in the prohibition; it was made only for the eaſe of the king; and, by the like reaſon, he might diſpenſe with the ſtatute of the 4. *Hen.* 4. c. 24. that a man ſhall hold the office of *aulnager* without a bill from the treaſurer; and with the ſtatute 31. *Hen.* 6. c. 5. that no cuſtomer or comptroller ſhall have any eſtate certain in his office; becauſe theſe and ſuch like ſtatutes were made for the eaſe of the ſovereign, and not to abridge his prerogative; and that the general clauſe of "*non obſtante aliquo alio ſtatuto*" was ſufficient (*a*).

(*a*) But now by 1. *Will. & Mary.* ſ. 2. c. 2. "No diſpenſation by *non obſtante* "of or to any ſtatute or any part thereof "ſhall be allowed, but the ſame ſhall "be held void and of none effect, "except a diſpenſation be allowed in "ſuch ſtatute."

If a man receive the profits of an office on pretence of title, the person who has a right to the profits may recover them by an action of *indebitatus assumpsit*, as for monies had and received to his use.

3. Lev. 262. 2. Lev. 245. Show. 35. Godb. 276. Cro. Jac. 566. 2. Saund. 344. 1. Frem. 473. T. Jones, 127. Moor, 458. 4. *Hen.* 7. 6. 6. *Hen.* 6. pl. 9. 1. Roll. Abr. 27. 597. pl. 5. 8. Mod. 373. 10. Mod. 23. 11. Mod. 146. 12. Mod. 16. 324. 495. 510. 521. Stra. 480. 592. 747. Ld. Ray. 842. 1007. 1210. 1217. 1. Salk. 9. 27. 2. Burr. 1005. 4. Burr. 2133. 2. Wilf. 95. Cowp. 416. 1. Com. Dig. "Action *assumpsit*," (A. 1.). 3. Bac. Abr. 732.

SECOND POINT.—POLLEXFEN, *for the defendant*. A general *indebitatus assumpsit* will not lie here for want of a privity (*a*), and because there is no contract. It is only *a tort*, a disseisin, and the plaintiff might have brought an assise for this office, which lies at the common law; and so it hath been adjudged in *Jehu Webb's Case*, 8. *Co.* 4. which is also given by the statute of *Westminster* 2. *cap.* 25. for a profit *à prendre in alieno solo*. The plaintiff might have brought an action on the case against the defendant for disturbing of him in his office; and that had been good, because it had been grounded on the wrong. In this case the defendant takes the profits against the will of the plaintiff, and so there is no contract; but if he had received them by the consent of the plaintiff, yet this action would not lie for want of privity. It is true, in the case of THE KING, where his rents are wrongfully received, the party may be charged to give an account as bailiff; so also may the executors of his accountant, because the law creates a privity; but it is otherwise in the case of a common person, 10. *Co.* 114. b. 11. *Co.* 90. b. because in all actions of debt there must be a contract, or *quasi ex contractû*; and therefore where judgment was had, and thereupon an *elegit*, and the sheriff returned that he had appraised the goods, and extended such lands, which he delivered to the plaintiff, *ubi revera* he did not, *per quod actio accrevit*, which was an action of debt, it was adjudged, that it would not lie, because the sheriff had not returned that he meddled with the goods, or with the value of them; and therefore for want of certainty how much to charge him with, this action would not lie, but an action on the case for a false return; but if he had returned the goods sold for so much money certain which he had delivered, then an action of debt would lie; for though it is not a contract, it is *quasi ex contractû*, *Hob.* 206.

WINNINGTON, *Solicitor General*, and SAWYER, *contra*, said, that an *indebitatus assumpsit* would lie here; for where one receives my rent, I may charge him as bailiff or receiver; or if any one receive my money without my order, though it is *a tort* yet an *indebitatus* will lie, because by reason of the money the law creates a promise; and the action is not grounded on the *tort*, but on the receipt of the profits in this case.

THE COURT. An *indebitatus assumpsit* will lie for rent received by one who pretends a title; for in such case an account will lie. Wherever the plaintiff may have *an account*, an *indebitatus* will lie.

[263]

A special verdict in *assumpsit* for the profits of a patent office, finding that the defendant had received the profits for *seven years*, although it appear that the patent was only *two years old*.

THIRD POINT.—POLLEXFEN *for the defendant*. The jury find, that the defendant received the profits for seven years, and that the plaintiff had his patent but two * years, and do not shew

(*a*) 2. *Hen.* 4. pl. 12. Bro. "Account," 24. 65. 89. Co. Lit. 212.

what

what was received by the defendant within those two years, and then the Court cannot apply it.

ARRIS AND ARRIS *against* STUKELY.

WINNINGTON and SAWYER held this objection to be nugatory and idle; for it cannot be intended that the damages given were for the time the defendant received the profits, before the plaintiff had his patent, neither is there any-thing found in the verdict to that purpose.

THE COURT. The finding is well enough; for the jury assess damages *occasione præmissorum in narratione mentionat.* which must be for the time the plaintiff had the office; and a patent will make a man an officer before admittance.

And, in the *Michaelmas Term* following, THE COURT gave judgment for the plaintiff.

TRINITY TERM,

The Twenty-Ninth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*

Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.* } *Justices.*
Sir William Scroggs, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

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* Steward, Executor of Steward, *against* Allen. Case 149.

DEBT FOR A RENT reserved upon a leafe for years, in which there was A PROVISO, "That if the rent be "behind and unpaid by the fpace of a month next after "any or either of the days of payment, then the leafe to be "void."

Demand muft be made where an intereft is to be determined.

Hob. 207. 331. 2. Roll. Abr. 429. Co. Lit. 201. Cro. Jac. 145. Hutton, 13. 10. Mod. 38. 12. Mod. 413. 5. Com. Dig. 430. 4. Bac. Abr. 353. and fee the cafe of Goodright v. Cater, ugl. 485.

The plea was, That the rent was behind a month after a day on which it was referved to be paid, and fo the leafe is void.

The plaintiff demurred to the plea, Becaufe the defendant did not fay that the plaintiff demanded the rent; for though the rent be due without demand, yet the intereft fhall not be determined without it *(a)*, which muft be exprefsly laid in the pleading.

And of that opinion was THE COURT, except ATKINS, *Justice*, who doubted.

(*a*) See 4. *Geo.* 2. c. 28. f. 2.

Scarl

Case 150. **Searl *against* Long.**

In *quare impedit* real mainpernors must be returned upon the *summons*, *pone*, and *grand cape*.

S. C. 1. Mod. 248.
2. Inst. 124.
Dyer, 353.
1. Brownl. 158.
10. Mod. 310.
5. Com. Dig. "Pleader" (3. I. 1.).

JUDGMENT FINAL was given in a *quare impedit*, according to the statute of *Marlebridge*, c. 12.

PEMBERTON, *Serjeant*, moved to set it aside. He said, that at the common law the process in a *quare impedit* was *summons*, *pone*, and *distress infinite*; which being found mischievous in respect of a lapse, it was therefore provided by this statute, 52. *Hen.* 3. c. 12. that if the disturbers do not appear upon the summons, then they shall be attached to appear at another day, &c. Now here upon the attachment the sheriff hath returned *attachiatus fuit* by JOHN DOE and RICHARD ROE, who are feigned persons, and not *mainperners*; for the defendant hath made oath, that he did not know any such persons, neither was he ever attached; so that it is not merely a matter of form, for he ought to have that notice which the law requires, it being so penal upon him. It is probable this mistake might arise from MR. DALTON, who in his book of "The Office of Sheriffs," in the returns of writs there, hath put down these feigned attachers for example's sake; from whence the sheriff in this case might infer that they need not be real persons, as in truth they ought, both upon the *summons*, *pone*, and *distress*; and he cited a case lately adjudged, where the like return was made upon the *grand cape*, and the judgment set aside.

And of this opinion was THE WHOLE COURT; and said, Where the process is so fatal, the party ought to * be duly served, and that the sheriff ought to have gone to the church, and to have seized the profits; and if there be nothing, to return a *nihil*; and though the judgment was given before the Term, or long since, yet when it is irregular it is to be set aside. And so it was now.—And being moved again, THE COURT continued of their former opinion.—The like was moved in *Michaelmas Term* following, in the case of *Fleming v. Lee*, where the patron defendant was thus summoned and never appeared, and the incumbent did cast an essoign; and a case was cited between *Vivian* and the *Bishop of London*, *Mich.* 23. *Car.* 2. in the common pleas, where the like judgment was set aside.

* [265]

11. *Hen.* 6. pl. 3. and 4.
36. *Hen.* 6. 23.
. *Hen.* 6. 8.
Long Quinto *Edw.* 4. pl. 26.
29. *Edw.* 3. pl. 42. and 43.
Doct. & Stud. 125, 126.
21. *Hen.* 6. pl. 56.

But *on the other side* it was objected, that leaving due notice upon the summons was as much as was required, for the other writs are only to give the defendant time to plead; and therefore it is not necessary that notice should be given upon every one of the writs, for if once served it is enough.

But THE COURT were of opinion, that the defendant having not appeared, nor cast an *essoign*, and *judgment final* being given, it was reason that all the process should be served really, of which there had been no occasion if he had either appeared or essoined. And therefore the process not being duly served, judgment was set aside, *Rast. Ent.* 217.

And they held, that the *essoign* of the other defendant was nowise binding to the patron defendant, because they may sever in pleading. And so that judgment was likewise set aside.

MICHAELMAS TERM,

The Twenty-Ninth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*
Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.* } *Justices.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

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* Sir John Otway *against* Holdips, Executor, &c. Case 151.

DEBT UPON BOND brought by the plaintiff against the defendant as executor, wherein the testator did acknowledge himself to be indebted to the plaintiff in forty pounds, which he thereby did covenant to pay when such a bill of costs should be stated by two attornies indifferently to be chosen between them; and sets forth in his declaration, that he named one attorney, and desired the now defendant to name another, which he refused, and so entitles himself to this action. The defendant pleads *non detinet*; to which the plaintiff demurred. But the plea was not offered to be maintained, because the executor cannot plead *non detinet* but where the testator himself might plead *nil debet*, which in this case he could not do.

An *executor* cannot plead *non detinet*, except where the *testator* might have pleaded *nil debet*.

Hard. 322.

But it was insisted, that the declaration is not good, because the money was to be paid upon an *account stated*, which not being done, by the plaintiff's own shewing it is not yet due; and this ought to be taken as penned, VIZ. *solvendum*, and not an express covenant.

A bond conditioned to pay when such a bill of costs should be stated by two attornies, to be indifferently chosen between the parties, is forfeited by a refusal to appoint an arbitrator.

But

Sir John Otway *against* Holdips.

But on the contrary it was held not to be a *solvendum*, but a covenant to pay the money, the debt and the duty being in the first place ascertained; but if it be a *solvendum*, and repugnant to the obligatory clause, it is void, 21. *Edw.* 4. *pl.* 36. As the defendant would have it expounded, it would be in his power totally to defeat the bond either way; for if he would never chuse an attorney, there could be never any-thing due.

* [267] * THE WHOLE COURT were of opinion that it was not a *solvendum*, but *a covenant*, which did not take away the duty ascertained by the obligation; and if it should not be a covenant, but an entire bond, then it would be in the power of the obligor whether ever it shall be payable; but be it either the one or the other, the plaintiff, having named an attorney, ought to recover. And judgment was accordingly given for him.

Case 152. Dunning *against* Lascomb.

An underwriter is not liable, unless the loss happens upon the voyage insured.

DEBT UPON A BOND.—The condition was, to pay money when a ship should go from *A.* to *C.* and from thence to *Bristol*, and should arrive there or at any other port of discharge in *England*.

39. *Hen.* 6. pl. 10. 1. Roll. Abr. 142.

The ship going from *A.* to *C.* took in provisions at *Bristol*, but not to be discharged there, but proceeded in her voyage to *Cales*, and was cast away.

2 Mod. 349. Ld. Ray. 1247. 1349. 2. Stra. 1264.

And by the opinion of THE COURT the money was not payable; but if he had never intended to perform the voyage, it might have been otherwise. Judgment for the defendant, *nisi*.

1. Atk. 545. Dougl. 271. 509. Cowp. 787. 1. Term Rep. 130. Parke on Insur. 56. 294.

Case 153. Atkins *against* Bayles.

To an information *qui tam* the defendant may plead in disability, that the plaintiff is outlawed, although the statute impowers *any person* to inform.

AN INFORMATION was exhibited against the defendant, being a justice of peace, for refusing to grant his warrant to suppress a conventicle. The defendant pleads an outlawry in disability; and the plaintiff demurred.—FIRST, This plea is not good, because the king is interested *qui tam*, &c. and therefore where the informer dies, the attorney general may proceed.—SECONDLY, The statute gives power to *any person* to inform, &c. by which general words the disability of this person is removed.—But THE COURT held, that there was no colour in either of these objections.

3. Inst. 194. Moor, 541. Dyer, 227.

Cro. Eliz. 583. 10. Mod. 188. 246. 357. 379. 409. 12. Mod. 175. 400. 413. 438. 444. 544. 1. Vern. 184. 2. Vern. 37. 198. 313. Gilb. Eq. Rep. 184. 1. Barnes, 228. 2. Peer. Wms, 269. Stra. 824. 901. 2. Hawk. P. C. 241. Ld. Raym. 1056. 1. Com. Dig. 6. 3. Bac. Abr. 762.

Outlawry pleaded in the same court need not be *sub pede sigilli*.

THIRDLY, It is not pleaded *sub pede sigilli*.—SED NON ALLOCATUR; for it need not be so pleaded, being in the same court.

Co. Lit. 128. b. Lutw. 40. 1514. 1. Salk. 217.

FOURTHLY,

Fourthly, It is not averred, that the plaintiff was the same person who was outlawed.—But it was answered, that the "*prædictus*" makes that certain; and that though the king be interested, yet the * informer only is plaintiff, and entitled to the benefit; and that though he was disabled, yet he might sue for the king, but not for himself (*a*). And therefore judgment was given that the plea was good.

In pleading outlawry to a *qui tam* information, the identity of the plaintiff need not be averred.

Lutw. 40.
3. Lev. 29.
1. Leon. 87. 1. Com. Dig. 7.

(*a*) Moor, 541. Dyer, 227. Cro. Eliz. 583.

Harwood and Bincks *against* Hilliard, &c. Case 154.

By an agreement between the plaintiffs and the testator of the defendant, a parcel of lands was to be sold for four hundred pounds; but if it did not arise to so much, then they covenanted with each other to repay proportionable to the abatement; and the defendant's testator covenanted for himself and his executors to pay his proportion to the plaintiffs, so as the plaintiffs gave him notice in writing of the said sale by the space of ten days; but doth not say that such notice was to be given to his executors or administrators. And now the plaintiffs averred, that they gave notice accordingly to the defendant who was executor; and the breach assigned was, that he hath not paid, &c. The defendant demands *oyer* of the indenture, wherein was a variance between the covenant (which was for notice to be given to the testator) and this declaration (by which notice is averred to be given to the executor); and for this reason he demurred.

If *A. agree* for himself, his executors, &c. to pay *B.* his proportion of the money that lands shall sell for less than such a sum, "so as *B* give "him *notice* in "writing of the "said sale," this amounts to *a covenant*; on which the *executor* of *A* having notice of the sale, is liable to an action, although no notice was given to his testator.

Dolben, *Serjeant*, *Recorder of London*, argued *for him*, that this was in the nature of a condition precedent, and therefore they ought to have given the testator notice, which according to the agreement ought also to have been personal; which not being done, but only notice given to his executor, did make a material and fatal difference between the covenant and this declaration, 14. *Hen.* 6. *pl.* 1. 1. *Hen.* 6. *pl.* 9.: and that in this case there was no covenant by the testator at all, for all agree to pay their proportions, and the testator should pay his part, which is not a covenant.

S. C. 3. Keb. 848.
1. Roll. Abr. 519.
Dyer, 14. 114. 257.
Cro. Eliz. 553.
Moor, 44.
Cro. Jac. 309.
Jones, 223. 1120.
Abr. Eq. 330.
11. Mod. 48.
Ld. Ray. 421.
Andr. 40.
2. Burr. 1190.

Barrel, *Serjeant*, *on the other side*, said, that the executor doth represent the person of the testator; and that though this covenant was to give notice to the testator, yet if the declaration had been of a covenant to give notice to him, his executors and administrators, &c. it had been no material variance, so as to prejudice the action of the plaintiff, because it is no more than what the law implies, *Pl. Com.* 192.

*The Chief Justice, and Atkins, *Justice*, upon the first opening this matter this Term, inclined that the notice ought to be personal, and that the variance was material: but afterwards in *Hilary Term* following, *mutatâ opinione*, the whole Court agreed

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HARWOOD AND BINCKS *against* HILLIARD, &c.

agreed it to be otherwife, becaufe the covenant runs in intereft and charge, and fo the executor is bound to pay; and therefore it is neceffary that he fhould have notice.—SECONDLY, That there was no material difference between the declaration and the covenant.—AND LASTLY, That the teftator being a party to the deed, his agreement to pay amounts to a covenant, though the formal words of "covenant, grant, &c." were wanting.

On a covenant to pay, "fo as "notice be "given in "writing," the declaration muft exprefsly ftate, that notice was given in writing; for ftating that it was given "*according to* "*the form of* "*the condition*," is not fufficient.

But then DOLBEN, *Serjeant*, perceiving the opinion of THE COURT, infifted, that the declaration was naught for another reafon, *viz.* They had not declared that this notice was given in writing, which is exprefly agreed in the covenant.

To which it was anfwered, that the defendant having pleaded that he gave notice *fecundum formam et effectum conditionis*, it was well enough.

But DOLBEN, *Serjeant*, faid, that would not help the want of fubftance; and cited a cafe where an action of debt was brought for the performance of an award, *fo as* the fame was delivered in writing, &c. and the defendant pleaded *non deliberavit in fcriptis, &c.* and the plaintiff replied, and fet forth the award in writing, but did not directly anfwer the plea of delivering it in writing, only by way of argument; and upon demurrer there, *omnes Jufticiarii contra querentem.*

Dyer, 243. b. Cowp. 665.

And fo they were in this cafe, that the notice muft be pleaded in writing, and that *fecundum formam conditionis* was not good.

And fo judgment was given for the defendant.

Cafe 155. Frofdick *againft* Sterling.

A hufband being feifed of a houfe in right of his wife, may bring an action alone for difturbing him in the enjoyment of it.

THE PLAINTIFF alone brought an action on the cafe againft the defendant; and fet forth, that he and his wife in her right were feifed of a meffuage, bake-houfe, and coal-yard, &c. and that the defendant had erected two houfes of office fo near the faid bake-houfe that the walls thereof became foundrous, and the air fo unwholefome that he loft his cuftom; and that the defendant had digged a pit fo near the faid coal-yard that the walls thereof were in danger of falling; and that he had built another wall fo near the faid meffuage that he had ftopped an old light therein: upon not guilty pleaded, there was a verdict for the plaintiff.

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S. C. 1. Freem. 236. 7. *Edw.* 4. pl. 15. 9. *Edw.* 4. pl. 55. 20. *Hen.* 6. pl. 1. 11. *Hen.* 4. pl. 16.

* GEORGE STRODE, *Serjeant*, now moved in arreft of judgment, For that the wife fhould have been joined in this action; for where fhe may maintain an action for *a tort* done in the life-time of her hufband, if fhe furvive, and where fhe may alfo recover damages, in fuch cafes fhe muft join; and it hath been adjudged, that fhe ought to join with her hufband for ftopping a way upon her land, *Cro. Car.* 418. So alfo for cuting down trees on the jointure of

46. *Edw.* 3. pl. 3. 1. Roll. Abr. 348. Cro. Eliz. 461. Cro. Jac. 205. 2. Inft. 650. Abr. Eq. 64. 8. Mod. 200. 341. 10. Mod. 162. 264. 12. Mod. 294. 346. Stra. 61. 229. 726. 977. Ld. Ray. 443. Dougl. 329.

the

FRODICK against STERLING.

the wife, made to her by a former husband, by reason whereof the present husband lost the loppings, they both joined; for though the wrong was done to his possession, and he might have released, yet because there was also a wrong done to the inheritance, they ought both to join, *Cro. Car.* 438. So it hath been adjudged; the husband and wife, in right of the wife, joined in an action of debt upon the statute of 2. *Edw.* 6. c. 13. for not setting out of tithes, and held good; and where the wife cured a wound, both joined in the action.

THE COURT held, That where the action (if not discharged) shall survive to the wife, they ought both to join; which if they had done here, it would have been hard to have maintained this action, because entire damages are given; and for losing the custom to his bake-house, the husband alone ought to have brought the action. He may bring an ejectment of the lands of his wife.

But judgment was stayed, till moved on the other side.

Barker *against* Warren. Case 156.

In a justification, where it is not local, a traverse of the place makes the plea naught.

AN ACTION was brought against a carrier, and laid in *London*, for losing of goods there which were delivered to him at *Beverly* in *Yorkshire*, to re-deliver at *London*. The defendant pleads, that he was robbed of the said goods at *Lincoln*, ABSQUE HOC that he lost them in *London*.

The plaintiff demurred.—FIRST, For that robbery is no excuse for a common carrier, so that the plea is not good in substance.—SECONDLY, This was no local justification, so that *the traverse* was ill.

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2. Ro. Ab. 567. 1. Ro. Ab. 395. Co. Lit. 283. 1. Leon. 39. Cro. Eliz. 184. 842. Lut. 1437. Savil, 22. Hard. 40. Cro. Jac. 45. 372. Comyns, 25. 8. Mod. 178. 11. Mod. 135. 12. Mod. 3. 482. Stra. 128. 145. 493. 574. 690. Ld. Ray. 121. 918. 1550. 1. Salk. 173. 5. Com. Dig. "Pleader," (G. 12.). 4. Bac. Ab. 79. 1. Wils. 81. Dougl. 747. Cowp. 18. 178. 1. Term Rep. 151.

* But HOPKINS, *Serjeant, on the other side* said, that the plea was good, and that the defendant might traverse the place: for in trespass for the taking of goods in *Coventry*, the defendant pleaded that the plaintiff delivered the goods to him at *London* to deliver at *Dale*, by force whereof he took them at *London* and delivered them at *Dale* accordingly, ABSQUE HOC that he took them at *Coventry*, and held good, for by his plea he hath confessed the delivery, and the taking both at one time and place; and he could not have pleaded the delivery at *London* and justify the taking at *Coventry*, because the possession is confessed by the first delivery at *London*, and therefore the justification of the taking at *Coventry* had been inconsistent, 24. *Hen.* 6. *pl.* 5. But it had been otherwise if the defendant had justified, because the plaintiff gave him the goods at *London*, by force whereof he took them at *London*, ABSQUE HOC that he took them at *Coventry*, because by such gift or delivery he might justify the taking any-where as well as where the delivery was made.—SECONDLY, That the declaration was ill, for the agreement was to deliver the goods at *London*, and the breach was that he left them at *London*, and so but argumentative, *Aston, pl. Red.* 62. *Hern's Pleader* 76. *Brownl. Pleadings* 139.

BARKER *against* WARREN.

But THE COURT was of opinion, that the declaration was good, and the plea was naught in substance. But if it had been good, *the traverse*, notwithstanding, had been ill, because the justification was not local; though SCROGGS, *Justice*, was of a contrary opinion.—And judgment was given for the plaintiff.

Visne altered *propter necessitatem.* 1. Com. Dig. 125.

NOTE, The plaintiff had leave given by the Court to alter *the visne* from *London* to *Middlesex*, because all the fittings in *London* were on a *Saturday*, and his witness was *a Jew*, and would not appear that day.

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Case 157.

Mendyke *against* Stint.

In an action on *the case* in the sheriff's court, if the declaration alledge that the cause of action arose within the jurisdiction of the court, when in fact it did not, and the plaintiff neglect to plead to the jurisdiction, the Court will not grant a *prohibition* after verdict and judgment given against him. Ante, 59. 195. 2. Inst. 299. 343. 601. F. N. B. 45. Hob. 106. Stiles, 45. 2. Ro. Ab. 318 Vaugh. 405. 1. Vent. 88. 333. 181. 1. Mod. 81. 63. 1. Sid. 151. 10. Mod. 127. 439. Ld. Ray. 211. 346. 835. 884. 1. Salk. 202. 4. Bac. Abr. 34. 254. 2. Vern. 483. Cowp. 166. 424. Dougl. 378.

PROHIBITION was prayed to the *sheriff's court* of *London*. The suggestion was, That the plaintiff was sued in that court in an action on the case, and sets forth the proceedings at large, that there was *a verdict* against him there, and averred that the contract upon which he was sued there *revera* was made in *Middlesex*, and so the cause of action did not arise within their * jurisdiction; and upon demurrer to the prohibition,

PEMBERTON argued, FIRST, That a prohibition doth lie to any court, as well temporal as spiritual (where such courts exceed their bounds), for both those jurisdictions are united to the imperial crown; it may be granted to the *dutchy court*, if they hold plea of lands not parcel of the dutchy. SECONDLY, Though the jury have here found that the defendant *assumpsit modo et formâ*, yet such finding as to time and place is not material; nor is it any *estoppel* in a new action laid in another county to aver that it was for the same thing. It is true, both time and place may be made material by pleading; and so it had been in this case, if the jury had found the place precisely, for it would have been an *estoppel*. The verdict therefore is nothing, and all they have done is *coram non judice*. The case of *Squib v. Hole (a)* was cited as an authority in point, where it was adjudged no escape in the officer to let a man at liberty who was in execution upon a bond sued in an inferior court, the bond not being made within the jurisdiction thereof.

But MAYNARD, DOLBEN, GOODFELLOW, and SYMPSON, *Serjeants*, *contra*. They agreed, that where it appears by the plaintiff's libel that the court had no jurisdiction, there a prohibition lies at any time; but if what is in the declaration is laid *infra jurisdictionem*, there the party must plead *extra jurisdictionem*; and if they refuse to plead to the plea, a prohibition will lie after sentence. But here is an action on the case brought, of which the *sheriff's court* can hold plea, and which is laid to be *infra jurisdictionem*, and not denied by the plaintiff in his plea; and therefore now, after verdict and judgment, he comes too late for a

(a) Ante, 29.

prohibition;

prohibition; and upon this difference prohibitions have been usually either granted or denied to the spiritual courts. Though the court hath not cognisance of the cause, yet the proceedings are not *coram non judice*; for if it be alledged to be within the jurisdiction, and the defendant take no exception to it, and then sentence is given against him, he hath thereby admitted the jurisdiction. So where a man sued for a legacy in the prerogative court, where the will was proved, and sentence given, and an appeal to the delegates, and sentence affirmed, and then a prohibition granted (but without notice) upon the statute of 23. *Hen.* 8. c. 9. for that the parties lived in another diocese; but the plaintiff having allowed the jurisdiction in all the former * proceedings, though the prohibition was granted, the Court would not compel the party to appear and plead, but granted a consultation, *Cro. Car.* 97. *Smith v. the Executors of Pondrel.* In *Hilary Term* 1675 in the king's bench, in the case of *Spring v. Vernon*, and in *Michaelmas Term* in 22. *Car.* 2. *B. R. Buxton's Case*, and in *Hilary Term* the 22. & 23. *Car.* 2. in the same court, in the case of *Cox v. St. Albon*, prohibitions were denied after the jurisdiction admitted by pleading.

See the case of Rowland v. Veale, Cowp. 18.

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THE CHIEF JUSTICE, WYNDHAM, and ATKYNS, *Justices*, upon the first argument inclined that a prohibition ought to be granted, because the admittance of the party cannot give a jurisdiction where originally there was none; but afterwards they were all of opinion, That the prohibition should not go, but said, that the plaintiff in the inferior court ought to have been non-suited, if it appeared upon the evidence that the cause of action did arise *extra jurisdictionem.*

Velthason v. Ormsley, 3. Term Rep. 315.

And THE CHIEF JUSTICE and WYNDHAM, *Justice*, were of opinion, that after the defendant had admitted the jurisdiction by pleading to the action, especially if verdict and judgment pass, the Court will not examine whether the cause of action did arise out of the jurisdiction or not.

See the case of Trevor v. Wall, 1. Term Rep. 151.

But ATKINS and SCROGGS, *Justices*, said nothing to this last point, but that many times an advantage given by the law was lost by coming too late, and instanced that *a visne* may be changed in time, but not if the party come too late; so if the time of the promise be laid above six years from the time of the action brought, if the statute of Limitations be not pleaded, the defendant cannot take afterwards advantage of it.

* Whereupon a prohibition was denied, and judgment was given for the defendant.

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IN THIS CASE these things were agreed by the Court. FIRST, That if any matter appears in the declaration which sheweth that the cause of action did not arise *infra jurisdictionem*, there a prohibition may be granted at any time.

In an action in an interior court, if want of jurisdiction appear upon the face of the proceedings, a *prohibition* shall go at any time.—Cro. Jac. 96. 1. Roll. Abr. 545. Dougl. 578. 1. Term Rep. 552. 3. Term Rep. 3. 315.

 SECONDLY,

Prohibition where the matter is not cognizable by the inferior court.

SECONDLY, If the subject matter in the declaration be not proper for the judgment and determination of such court, there also a prohibition may be granted at any time.

If a plea to the jurisdiction of an inferior court is prevented by artifice, a prohibition will lie at any time.—2. Inst. 230. Lutw. 1026.

THIRDLY, If the defendant, who intended to plead to the jurisdiction, is prevented by any artifice, as by giving a short day, or by the attorney's refusing to plead it, &c. or if his plea be not accepted or is over-ruled; in all these cases a prohibition likewise will lie at any time.

Case 158.

Birch *against* Wilson.

In an action on the case for disturbance of common, A SPECIAL PLEA that *A.* being seised of such lands, with all commons and emoluments to the premises belonging or therewith used, conveyed them to the defendant, and that the tenants and occupiers of the said lands, &c. have *used* to have common therein, *virtute cujus* he having right did put his cattle in to take common there, and that there was sufficient common both for *the plaintiff* and himself, is a sufficient statement of a right of common; and although it amount to the *general issue*, yet, as it also discloses *matter of law*, it is good.

ACTION ON THE CASE.—The plaintiff declared, that he was seised of a messuage and several lands in the parish of *Dale*, and that he and all those whose estate he hath, have *used* to have right of common for all commonable cattle *levant et couchant* upon the premises, in a certain meadow there called *Darpmore Meadow*, and in a certain place called *Cannock Wood*; that the defendant, *præmissorum non ignarus*, had enclosed the said places in which the plaintiff had right of common, and likewise put in his cattle, as horses, cows, hogs, geese, &c. so that he could not *in tam amplo et beneficiali modo* enjoy the same.

THE DEFENDANT, as to the inclosure and putting in of his hogs and geese, pleaded *not guilty:* and as to the residue, That *Lord Paget* was seised of a messuage, three hundred acres of land, forty acres of meadow, and a hundred acres of pasture, and likewise of *Darpmore Meadow* and *Cannock Wood*; and, being so seised, did by deed of bargain and sale enrolled, in consideration of two thousand pounds, convey the said messuage, three hundred acres of land, forty acres of meadow, and a hundred acres of pasture, to the defendant and his heirs, and by the same deed did grant to him all ways, commons, and emoluments whatsoever to the said messuage and premises belonging, or therewithal used, occupied, or enjoyed, or taken as part, parcel, or member thereof; *virtute cujus* the defendant became seised of the premises; and that the same were leased and demised for years by the said *Lord Paget*, and all those whose estate he had *à tempore cujus contrarii memoria hominum non existit*; and that the tenants or occupiers thereof *à tempore cujus*, *&c.* used to have common in *Darpmore Meadow*, and *Cannock Wood*, for all commonable cattle *levant et couchant* upon the premises, and used to put in their cattle into the said places in which, &c. *virtute cujus* the defendant having right did put in his said cattle into the said places, to take common there; and averred, that there was common sufficient both for the plaintiff and himself.

2. Vent. 295. Skin. 362.

To this plea the plaintiff demurred.

Cro. Eliz. 871. 3. Lev. 40. 11. Mod. 53. 72. 12. Mod. 25. 35. 97. 121. 316. 376. 537. 1. Salk. 34[illegible] 394. 5. Com. Dig. "Pleader" (E. 14.). 4. Bac. Abr. 63. 1. Wils. 45.

PEMBERTON,

* PEMBERTON, *Serjeant*, *for the plaintiff* said, That it was no good plea, but rather a design to introduce a new way of common. The reasons offered why the plea was not good, were, BIRCH *against* WILSON.

FIRST, That the defendant could not prescribe because of the unity of possession, for the *Lord Paget* had the premises in and to which, &c. and therefore he hath prescribed by a collateral matter, *viz.* by alledging that the land was usually let to tenants for years, but doth not say whether they were tenants by copy of court roll or not, neither doth he make out any title in them. In some cases where a man is not privy to the title, he may say generally that the owners and occupiers used to do such a thing, &c. and this way of pleading may be good; but here the defendant claiming under them ought to set forth their title, or else he can have no right to the common.

Cro. Car. 419.

See the case of Clarke *v.* King, 3. Term Rep. 147.

See Rider *v.* Smith, 3 Term Rep. 766.

SECONDLY, By this plea he intended that the *Lord Paget* had made a new grant of this common; for he sets forth, That he granted the premises, and all commons used with the same, and so would intitle himself to a right of common in these two places, as if common had been expresly granted to him there; which if it should, it is but argumentative, and no direct affirmance of a grant upon which the plaintiff might have replied "*non concessit*," for no issue can be joined upon it.

THIRDLY, He ought to have set forth, That the tenants lawfully enjoyed the common there; but he lays only an *usage* to have common, which may be *tortious*.

FOURTHLY, He doth not say, That there is sufficient common for all the commoners, but only for the plaintiff and himself: it is true, the owner of the soil may feed with his tenant who hath a right of common, but he cannot derogate from the first, by straitening the common by a second grant, and so leave not sufficient for the tenant. 1. Term Rep. 391.

FIFTHLY, This plea amounts to the *general issue*, and the plaintiff hath specially assigned that for a cause of demurrer; for he saith, That the defendant, without any title, put in his cattle, by which the plaintiff had not sufficient common; and the defendant pleads he put in his cattle rightfully, and the plaintiff had common enough; which, if it signify any thing, must amount to not guilty. Cro. Car. 157.

* But by WESTON, *Serjeant*, *on the other side*, the last objection was endeavoured to be answered FIRST, Because if that hold, yet, if the plea be never so good in substance, the plaintiff would have judgment. It was agreed, that this plea doth amount to a *general issue*, and no more, but that every plea that doth so is not therefore bad; for if it otherwise contain reasonable matter of law, which is put upon the Court for their judgment, rather than referred to the jury, there is no cause of demurrer; for it is the same thing to have the doubt or question in law before the Judges in [276]

Birch *against* Wilson. pleading, as to have it before them upon a special verdict. In the Year Book 2. *Rich.* 2. *pl.* 18. a retainer was pleaded specially by an administrator, which is no more than *plenè administravit*, yet no demurrer; but the Book saith, that the Court ought to be moved

11. Mod. 53. 72. SECONDLY, The plea is good as to the matter of it; for the defendant claims the same common by his grant, which had been used time immemorial, and alledges it to be of all common used with the premises, and this was a common so used. In trespass (a) the defendant justified that *Godfrey* was seised in fee of a house, and of twenty acres of land, and that he and all those, &c. had common in the place WHERE, &c. to the said messuage belonging; and that he made a feoffment to *Bradshaw* of the same, who made a lease thereof to the defendant, with all profits and commodities thereunto belonging, "*vel occupat. vel usitat. cum prædicto messuagio*;" it was adjudged, that though the common was gone and extinct in the hands of the feoffor by the unity of the possession, yet those words were a good grant of a new common for the time granted in the lease, and that it was *quasi* a common in the hands of *Godfrey* the feoffor.

And THIRDLY, Though it hath been objected, that this plea is not formally pleaded, because it ought to have been direct in alledging a grant, whereas it was only argumentative, and brought in by a side wind; he said, That, as bad as it was, it was drawn by that serjeant who argued against him, and who did very well know that the averment of sufficiency of common was needless.

THE COURT were all of opinion, That though the plea did amount to the *general issue*, yet for that reason alone the plaintiff
* [277] had no cause of demurrer; for the defendant may * well disclose
2. Vent. 295. the matter of law in pleading, which is a much cheaper way than
Comyns, 330 to have a special verdict, and that this is on the same reason of
Ld. Ray 125 *giving of colour*; but if the matter by which the defendant jus-
393. 566. tifies be all matter of fact, and proper for the trial of a jury, then the defendant ought to plead the general issue.

And as to the matter of the plea, THE CHIEF JUSTICE and WYNDHAM, *Justice*, held it to be good; for the common which was pleaded was a common by grant, and not argumentatively pleaded; for if the defendant had pleaded an express grant of common in those two places, and the plaintiff had demanded *oyer* of the deed, it would have appeared that there was no such deed, and this had been a good cause of demurrer. If this plea should not be good, it would be very mischievous to the defendant; for there being a perpetual unity as to the freehold, there can be no prescription to the common; but there being a constant enjoy-
2. Vern. 250. ment thereof by the tenants, and so a perpetual usage and a grant made referring to that usage, it is well enough: and since, whilst the lands were in possession of the lord, the commoners could not

(a) Godfrey *v.* Eyre, Cro. Eliz. 570.

complain

complain of a furcharge; why fhould they, if he grant the pre-mifes, the grantee being *in loco, &c.* In the cafe of the king a grant of "*tot et talia libertates et privilegia quot et qualia* the abbot lately had, was held good by fuch general words (a): here *Lord Paget* granted to the defendant that which the leffees had before, *viz.* that common which the tenants had time out of mind; and it cannot be conceived but that the tenants had a right; for as a *tort* cannot be prefumed to be from time immemorial, fo neither fhall it be intended that the lord gave only a licence, and permitted his tenants to enjoy this common. BIRCH *againft* WILSON.

But ATKINS, *Juftice*, was of opinion, that the plea was not good. He faid, he knew not by what name to call this common; for it was no more than a permiffion from the lord, that the tenants might put their cattle into his freehold, or a connivance at them for fo doing: and if it be taken as a new grant, then nothing can pafs but the furplus; for the lord cannot derogate from his former grant, and the new grantee fhall not put in an equal proportion with him who hath the prefcription; for if he may, then fuch prefcription would be quite deftroyed by fuch *puifne* grant; for as the lord might grant to * one, fo he might to twenty, [278] and then there would not be fufficient common left for him who prefcribes to the right: fo he conceived that the defendant had no right of common, or if he had any, it would not be till after the right of the plaintiff was ferved; and he faid, that ufage fhall not intend a right, but it may be an evidence of it upon a trial. But if there had been an ufage, it is now loft by the unity of the poffeffion, and fhall not be revived by the new grant, like the cafe of *Maffam v. Hunter*; there was a copyholder of a mef-fuage and two acres in fee, which the lord afterwards granted and confirmed to him in fee *cum pertinentiis*; it was adjudged, that though the tenant by ufage had a right to have common in the lord's wafte, yet by this new grant and confirmation that right was gone (the copyhold being thereby extinguifhed); for the common being by ufage and now loft, thefe words "*cum perti-*"*nentiis*" in the new grant will not revive it. Yelv. 189. Abr. Eq. 104. 2. Vern. 127. 250. 390. 516. See the cafe of Revell v. Jodrell, 2. Term Rep. 415.

But, notwithftanding, JUDGMENT, by the opinion of the other three Juftices, was given for the defendant.

(a) 9. Co. 23. Abbot de Strada Marcella's Cafe.

Week's Cafe. Cafe 159.

A PROHIBITION was prayed to the ecclefiaftical court at *Briftol.*

If the fpiritual court call a man to take an oath tending to accufe himfelf, a prohibition lies.

The fuggeftion was, That he was *excommunicated* for refufing to anfwer upon oath to a matter by which he might accufe himfelf, *viz.* to be a witnefs againft another, that he himfelf was prefent

Ld. Ray. 701. Ante, 218. 1. Sid. 238. 4. Com. Dig. 507. 3. Bl. Com. 101.

WEEK'S CASE. such a day, and saw the other at a conventicle; which if he confessed, they would have recorded his confession of being present at a meeting, and so have proceeded against him.

THE COURT granted a prohibition, but ordered him to appear in the ecclesiastical court, to be examined as to the other persons being there (*a*).

(*a*) By 13. *Car.* 2. c. 12. it is enacted, "That it shall not be lawful for any "bishop or ecclesiastical judge to tender "or administer to any person whatsoever "ever THE OATH usually called the "oath *ex officio*, or any other oath whereby he may be compelled to confess, accuse, or purge himself, of any criminal matter or thing, whereby he may be liable to any censure or punishment."

* [279]

Case 160.

* Anonymous.

A bond given to a third person in discharge of a gaming debt, is not *void* by the statute 16. *Car.* 2. c. 7. s. 3. if the obligee was not privy that the money was won at play.
Ante, 54.
2. Vern. 70. 291.
Comyns, 4.
10. Mod. 312.
12. Mod. 69.
81. 97. 258.
Stra. 1048.
1079. 1155.
1249.
3. Salk. 134.
344.
5. Mod. 175.
2. Burr. 1077.
4. Com. Dig.
8c.
5. Com. Dig.
610.
2. Term Rep.
439.

A MAN wins a hundred pounds of another at play. The winner owed *Sharp* one hundred pounds, who demanded his debt. The winner brought him to the other of whom he won the money at play, who acknowledged the debt, and gave *Sharp* a bond for the payment of the hundred pounds; who not being privy to the matter, or knowing that it was won at play, accepted the said bond, and for default of payment puts it in suit. The obligor pleads the statute of Gaming. The plaintiff in his replication discloses the matter aforesaid, and says, that he had a just debt due and owing to him from the winner, and that he was *not privy to the money's being won at play*, &c. and that he accepted of the said bond as a security for his debt: and the defendant demurred.

And THE COURT were all of opinion, that this case was not within the statute, the plaintiff not knowing of the play; and though it be pleaded that the bond was taken *pro securitate*, and not for *satisfaction* of a just debt, it was held well enough, like the case of *Warns v. Ellis*, *Yelv.* 47. *Warns* owed *Alder* a hundred pounds upon an usurious contract, and *Alder* owed the plaintiff *Ellis* a hundred pounds, for which they were both bound; and in an action of debt brought upon this bond, *Warns* pleads the statute of Usury between him and *Alder*; and *Ellis* replied as the plaintiff here; and upon a demurrer it was adjudged for the plaintiff by three Judges, because the plaintiff had a real debt owing him, and was not privy to the usury (*a*): and upon this case the Court relied, and said, the reason of it governed this case at the bar.

Whereupon judgment was given for the plaintiff (*b*).

(*a*) But see Lowe *v.* Waller, Dougl. 736. that both the *contract* and the *security* are void.

(*b*) By 9. *Ann.* c. 14. "All notes, "bills, *bonds*, judgments, mortgages, "or other securities or conveyances "whatsoever, given, granted, drawn, or "entered into, or executed by any person "or persons whatsoever, where the whole "or any part of the consideration of such "conveyances or securities shall be for "any money or other valuable thing "whatsoever won by gaming, or by "betting on those who do play, or for "the re-imbursing or repaying any money knowingly lent or advanced for "such gaming, &c. shall be utterly void, "frustrate, and of none effect."— And it seems to be now settled, that all *securities* given for money won at play are absolutely void, even in the hands of third persons, though they paid a valuable consideration for them, and had no notice of their having been given for money won at play.—See Colburn *v.* Stockdale, 8. Mod. 57.; Boujean *v.* Walmsley, 2. Stra. 1249.; Robinson *v.* Bland, 2. Burr. 1077.; Brown *v.* Berkley, Cowp. 281.; Lowe *v.* Waller, Dougl. 743.

Tiffard *against* Warcup. Cafe 161.

INDEBITATUS ASSUMPSIT FOR SEVEN HUNDRED AND FIFTY POUNDS laid out by the plaintiff for the ufe of the defendant: upon *non affumpfit* pleaded, there was a trial at the bar.

On *affumpfit* for money laid out and expended, evidence that it was to be paid out of the firft profits is a fatal *variance*.

The evidence was, That the defendant and another, now deceafed, farmed the excife; that the money was laid out by the plaintiff on the behalf of the defendant and his partner; and that the defendant promifed to repay the money out of the firft profits he received.

1. Wilf. 116. Cowp. 766. 1. Com. Dig. 22.

* THE WHOLE COURT were of opinion, that this action would not lie.

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One partner cannot be fued alone for a matter concerning the partnerfhip.

FIRST, Two partners being concerned, the action cannot be brought againft one alone *(a)*: he ought in this cafe to have fet out the death of the other *(b)*: but if judgment be had againft one, the goods in partnerfhip may be taken in execution (*c*).

SECONDLY, The promife here was not to pay the money abfolutely, but *fub modo*; fo that the evidence did not maintain the action (*d*).—And the plaintiff was nonfuited.

(*a*) Salk. 440. Carth. 63. Lutw. 696. 1. Com. Dig. 22. Stra. 473. 503. 553.
(*b*) See 8. & 9. *Will.* 3. c. 10.
(*c*) See 1. Show. 173. Salk. 392. Carth. 217. 12. Mod. 446. Ld. Ray. 871. 3. Peer. Wms. 25. Cowp. 448. Dougl. 650.
(*d*) Cro. Eliz. 239. Hob. 180. 1. Roll. Rep. 233.

Nichols *againft* Ramfel. Cafe 162.

By a releafe of all demands till 26. *April*, a bond dated that day is not releafed.

TRESPASS done 24 *Martii* 26. *Car.* 2. *ufque* 26 *Augufti* 28. *Car.* 2. *diverfis diebus et vicibus*, &c.—The defendant pleaded, that on the 24th day of *April*, in the 26th year of *King Charles the Second*, he paid the plaintiff fixpence, which he received in full fatisfaction of all trefpaffes *ufque ad* the faid 24th day of *April*, ABSQUE HOC that he was guilty *ad aliquod alind tempus præter prædictum* 24 *Aprilis*, *anno* 26. *Car.* 2. *aut aliquo tempore poftea*, but leaveth out the 24th day of *April*.

Owen, 50. 2. Ro. Ab. 521. Palm. 531. Ld. Ray. 85. 281. 336. 480. Cald. 19. 4. Com. Dig. 385. Cowp. 714. 1. Term Rep. 490. See Knox *v.* Simmonds, 3. Brown's Cafes in Chan. 358. 2. Conft's Bott. 395. pl. 367.

And for that reafon the plaintiff demurred, Becaufe the defendant had not anfwered that day; for the word *ufque* excludes it. So where debt was brought upon a bond dated 9 *Julii*, the defendant pleaded a releafe of all actions, &c. the fame day *ufque diem dati ejufdem fcripti*, the bond was not difcharged, becaufe the releafe excludes the 9th day, on which it was made.

But WESTON, *Serjeant*, *contra*. Though generally in pleading the word *ufque* is exclufive; yet in the cafe of contracts, becaufe of the intent of the parties, it is inclufive; and therefore in one *Nichol's Cafe*, 20. *Car.* 2. in the king's bench, *Roll.* 21. (the Term was not named) a leafe was made HABENDUM from

Lady-day

NICHOLS *against* RAMSELL.

Lady-day usque festum sancti Michaelis 1665, paying the rent reserved at *Michaelmas* during the term; the rent shall be paid on *Michaelmas-day* 1665, and so the day shall not be excluded. So where a man prescribes to put cattle from and immediately after *Lady-day*, where they are to stay till *Michaelmas-day*; the putting them in on *Lady-day* and driving them away on *Michaelmas-day* is not justifiable in strictness, yet it hath been allowed good.
[281] * So in a devise the question was, Whether the testator was of age or not? And the evidence was, that he was born the first day of *January* in the afternoon of that day, and died in the morning on the last day of *December*: and it was held by all the Judges that he was of full age; for there shall be no fraction of a day.

NORTH, *Chief Justice*, said, that *primâ facie* this is to be intended good; for a day is but *punctum temporis*, and so of no great consideration.

But THE OTHER THREE JUSTICES were of opinion, that the word *usque* was exclusive; and that the plaintiff should not be put to shew that there was a trespass done on the 24th of *April*; and said, that in a release of all demands *till* the 26th of *April*, a bond dated that day is not released. Wherefore judgment was given for the plaintiff

Case 163. Trevil *against* Ingram.

Release of all demands doth not bar a future duty.

S. C. ante, 93. S. C. 1. Mod. 216. S. C. 1. Vent. 314. S. C. 2. Lev. 210. S. C. 3. Keb. 785. 829. 1. Roll. Abr. 407. Lit. sect. 508. 510. 1. Sid. 147. 2. Lev. 215. Cro. Jac. 170. 486. 623. 5. Co. 71. 10. Mod. 87. 165. 423. 12. Mod. 204. 256. 401. 455. 651. 1. Peer. Wms. 239. 728. Ld. Ray. 235. 515. 522. 664. 786. 1242. 1306. 5. Com. Dig. 411. 4. Bac. Abr. 283. 285. 290.

COVENANT TO PAY AN HERIOT *post mortem J. S.* or forty shillings at the election of the plaintiff; and sets forth the death of *J. S.* and that afterwards he chose to have the forty shillings, for which he brought this action, and assigns the breach for non-payment. The defendant pleaded, that the plaintiff released to him "all actions and demands, &c." but this release was made in the life-time of *J. S.* and there was an exception in it of heriots. The plaintiff demurred.

GEORGE STRODE, *Serjeant*, argued, that this action was not discharged by that release, and cited *Hoe's Case*, 5. *Co.* 70. where it was held, that a duty uncertain at first, which, upon a condition precedent, was to be made certain afterwards, was but *a possibility* which could not be released; that the duty in this case was uncertain, because the plaintiff could not make his election till after the death of *J. S.* A covenant to repair, and a release pleaded to it within three days after the date of the indenture, and upon a demurrer it was held, that it being a future covenant, and not in demand at the time of the release, although it was of all demands, yet that covenant was not thereby released (*a*). So here neither

(*a*) Hancock *v.* Field, Cro. Jac. 170. and 2. Roll's Abr. 407.; but it is said by the Court, that if he had released all covenants in such an indenture, that had been a bar. 5. Co. 71. a. *Note to the* FOURTH EDITION.—See also Co. Lit. 265. 291. Cro. Jac. 623.

the heriot nor the forty ſhillings were either of them in demand at the time of the releaſe given; and it plainly appears by the exception in the releaſe, that it was the intention of the parties not to releaſe the heriots. TREVIL *againſt* INGRAM.

And of that opinion was THE WHOLE COURT: whereupon judgment was given for the plaintiff.

* NORTH, *Chief Juſtice.* It is the opinion of *Littleton* (*a*), * [282] that a releaſe of "all demands" doth releaſe a rent; and of that opinion was TWISDEN, *Juſtice*, in the argument of the caſe of *Hen v. Hanſon*; though it was reſolved there, that a releaſe of all demands did not diſcharge a rent reſerved upon a leaſe for years, becauſe ſuch rent is executory, and incident to the reverſion, and grows every year out of the land; but when it is ſevered from the reverſion, as by aſſigning over the whole term, then it becomes a ſum in groſs, and is due upon the contract, and in that caſe a releaſe of "all demands" diſcharges a rent afterwards due.

(*a*) Sect. 508. 510. 2. Roll. Abr. 408. Sid. 141.

HILARY

HILARY TERM,

The Twenty-Ninth and Thirtieth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt.* *Chief Justice.*

Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.* } *Justices.*

Sir William Jones, *Knt.* *Attorney General.*
Sir Francis Winnington, *Knt.* *Solicitor General.*



* Shambrok *against* Fettiplace. Case 164.

PROHIBITION.—The question was, Whether *a prescription* be good to *an aisle in a church* which he and all those, &c. used to repair, as belonging to a manor, where he had no dwelling-house, but only land? Prescription to have an aisle in a church because of repairing, no good cause for a prohibition.

GEORGE CROKE, *Serjeant*, argued that it was good, and cited the case of *Boothby v. Bayly*, where such a prescription as this was held to be a good ground for a prohibition. *Vide Moor Rep.* 878. *contra.* Hob. 69. 2. Inst. 489. 653. 2. Lev. 241. 8. Mod. 338. Salk. 551. Ld. Ray. 59.

THE COURT inclined, that it was not good; but ordered the prohibition to go, and the defendant to plead, that it might come judicially before them to be argued.

HILARY TERM,

The Twenty-Ninth and Thirtieth of Charles the Second,

IN

The Exchequer Chamber.

KING'S BENCH.	COMMON PLEAS.
Sir Rich. Rainsford, *Knt. Chief Justice.*	*Sir* Francis North, *Knt. Chief Justice.*
Sir Tho. Twisden, *Knt.* } *Justices.*	*Sir* Hugh Wyndham, *Knt.* } *Justices.*
Sir William Wylde, *Knt.*	*Sir* Robert Atkins, *Knt.*
Sir Thomas Jones, *Knt.*	

EXCHEQUER.

Sir William Montague, *Knt. Chief Baron.*

Sir Edward Turner, *Knt.*
Sir Edward Thurland, *Knt.* } *Barons.*
Sir Francis Bramston, *Knt.*

Dashwood *against* Cooper and Others. Case 165.

In a negative plea, *viz.* that three did not such a thing, it must be said *nec eorum aliquis.*

ERROR OF A JUDGMENT IN TRESPASS, wherein *Cooper* and others brought an action of trespass against *Dashwood* for entering into a brew-house and keeping of possession, and taking away of fifty shillings.—THE DEFENDANT pleaded, that the plaintiffs had committed an offence against the statute of 12. *Car.* 2. *cap.* 23. by which it is enacted, " That all offences there- " by prohibited (except in * *London*) shall be heard by two or " more of the next justices of peace; and in case of their neglect " or refusal by the space of fourteen days after complaint made, " then the sub-commissioners of the excise are to determine the " same, from whom no appeal doth lie to the justices of the peace " at their next sessions; which commissioners of excise, justices " of the peace, and sub-commissioners, amongst other things, are " enabled by the said act to issue out warrants under their hands, " &c. to levy the forfeitures;" and so justified the entry under a warrant

* [284]

8. Mod. 108. 330. 343. 10. Mod. 368. 12. Mod. 130. 240. 494. 1. Barnes, 333. Stra. 606. 1110. 1171.

DASHWOOD *against* COOPER AND OTHERS.

warrant from the ſub-commiſſioners; three juſtices having refuſed to hear and determine this offence. To this plea the plaintiffs demurred, and had judgment in the court of king's bench; and a writ of inquiry of damages was executed, and ſeven hundred and fifty pounds damages given.

It was alledged, that the defendant could not move to ſet aſide the judgment in that Term it was given, becauſe the writ of inquiry was executed the laſt day of the Term, and the Court did immediately riſe; and that he could not move the next Term, becauſe the judgment was given the Term before the writ of error was brought.

THE ATTORNEY GENERAL therefore ſaid, that this was a hard caſe, and deſired a note of the exceptions to the plea, which he would endeavour to maintain; which MR. POLLEXFEN gave him, and then he deſired time to anſwer them.

The exception to the plea upon which the judgment was given was this, *viz.* The act giveth no power to the ſub-commiſſioners to hear and determine the offences, and ſo to iſſue out warrants for the forfeitures, but where the juſtices or any two of them refuſe: and though it was ſaid by the defendant that three refuſed, yet it was not ſaid that two did refuſe.

There is a great difference between the allegation of a thing in the affirmative and in the negative; for if I affirm that *A. B. C.* did ſuch a thing, that affirmation goes to all of them, but negatively it will not hold; for if I ſay *A. B. C.* did not ſuch a thing, there I muſt add, *nec eorum aliquis.* So if an action be brought againſt ſeveral men, and a *nolle proſequi* is entered as to one, and a writ of inquiry awarded againſt the reſt, which recites, that the plaintiff did by bill implead (naming thoſe only againſt whom the inquiry was awarded, and leaves out him who got the *nolle proſequi*), this is a variance, for it ſhould have been brought againſt them all. * It is true, where a judgment is recited, it is enough to mention thoſe only againſt whom it is had, but the declaration muſt be againſt all: ſo in a writ of error if one is dead he muſt be named.

5. Com. Dig. 71.

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And ſo the juſtices ought all to be named in this caſe, *viz.* that the three next juſtices did not hear and determine this offence, *nec eorum aliquis.*

HILARY

HILARY TERM,

The Twenty-Ninth and Thirtieth of Charles the Second,

I N

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*

Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.* } *Justices.*
Sir William Ellis, *Knt.*

Sir William Jones, *Knt. Attorney General.*

Sir Francis Winnington, *Knt. Solicitor General.*

Wells *against* Wright. Case 166.

DEBT UPON BOND conditioned, That if the obligee shall pay twenty pounds in manner and form following, that is to say, five pounds upon four several days therein named, but if default shall be made in any of the payments, then the said obligation shall be void, or otherwise to stand in full force and virtue.

A bond conditioned that the obligee shall pay twenty pounds, *viz.* five pounds on four several days therein mentioned, or in default of any of the payments the bond shall be void, is good.

The defendant pleads, that *tali die, &c. non solvit* five pounds &c.; and upon this the plaintiff demurred.

BARREL, *Serjeant.* The first part of the condition is good, which is to pay the money, and the other is surplusage, void, and insensible. But if it be not void, it may be good by transposing thus, *viz.* If he do pay, then the obligation shall be void; if default shall be made in payment, then it shall be good; and, for authority in the point, the case of *Vernon v. Alsop* (a) was cited, where the condition was, that if the obligee pay two shillings per week until the sum of seven pounds ten shillings be paid (*viz.* on every Saturday), and if he fail in payment at any one day that the bond shall be void; and upon the like plea and demurrer as here, it

Sid. 105. 1. Saund. 66. 2. Saund. 79. Abr. Eq. 84. 1. Vern. 413. 483. 2. Vern. 102. 187. 215. 233. 242. 251. 308. 480. 509. Prec. Chan. 182. 237. 267. 309. 313. 522. 10. Mod. 47. 134. 154. 223. 450. 12. Mod. 193. 418. Stra. 140.

(a) 1. Lev. 77. Raym. 68. 1. Sid. 105. 1. Keb. 356. 415. 451.

was

Wells *against* Wright.

was adjudged that the obligation was single, and the condition repugnant.

The Court were all of opinion, that judgment should be given for the plaintiff; and the Chief Justice said, that he doubted whether the case of 39. *Hen.* 6. *pl.* 10. is law.

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Case 167.

* Brittam *against* Charnock.

On a devise to an *eldest son* and his heirs within four years after the death of testator, provided he pay twenty pounds to the executor towards the payment of the testator's debts; the son takes the estate by *purchase*, and not by *descent*, although the testator devised other lands to be sold for the payment of debts.

DEBT upon bond against the defendant as heir: upon "*riens per descent*" pleaded, the jury found a special verdict, in which the case was thus:—The father was seised of a messuage and three acres of land in fee, and devised the same to his eldest son (the defendant) and his heirs within four years after his decease, PROVIDED the son pay twenty pounds to the executor towards the payment of the testator's debts: and then he devised his other lands to be sold for payment of debts, &c. The father dies. The son pays the twenty pounds.

The question was, if this messuage, &c. was *assets* in the hands of the defendant?

It was said, that it was not *assets*, because the heir shall not take by *descent*, but by *purchase*; for the word "paying" is no *condition*; if it should, the heir is to enter for the breach, and that is the defendant himself; and for that reason it shall be a *limitation*. It is true, where there is no alteration of the estate, the heir must take by *descent*; but in this case there is an alteration of the estate from what is directed by the law, viz. the manner how he shall come by the estate, for no fee passeth to him during the four years.

But this was denied by Pemberton, *Serjeant*; for he said, if a devise be of land to one and his heirs within four years, it is a present devise, and if such be made to the heir it is a descent in the mean time, and the words "within four years" are void; so that the question will be, Whether the word "paying" will make the heir a purchasor? and he held it would not: he agreed, that it was usual to make that a word of *limitation*, and not a *condition*, when the devise is to the heir; and therefore in a devise to the heir at law in fee he shall take by descent, *Styles Rep.* 148. But if this be neither a condition nor a limitation, it is a charge upon the land, and such a charge as the heir cannot avoid in equity.

North, *Chief Justice*, and Atkins, *Justice*. Where the heir takes by a will with *a charge*, as in this case, he doth not take by *descent*, but by *purchase*; and therefore this is no assets (*a*).

S. C. 1. Freem. 248. Ante, 50. 207. Dyer, 124. 371. Stiles, 148. Cro. Eliz. 431. 833. 919. Cro. Car. 161. 3. Lev. 127. Abr. Eq. 206. 275. 1. Vern. 338. 2. Vern. 429. 729. Prec. Chan. 222. 2. Barnes, 136. 8. Mod. 23. 10. Mod. 421. 425. 11. Mod. 61. 98. 119. Stra. 129. 487. 491. 665. 1270. Ld. Ray. 829. 1. Com Dig. "Assets" (B.). 3. Com. Dig. "Devise" (N. 10.) Salk. 241. 1. Bl. Rep. 22. 2. Bl. Com. 422. 3. Peer. Wms. 341. 1. Brown's Cas. in Chan. 136. Powel on Devises, 434

(*a*) But see the case of Claud *v.* Smith in Mr. Rose's edition of Comyns' Rep. page 72. and the cases there cited; and the case of Emmerson *v.* Inchbrid, in Mr. Bailey's edition of Lord Ray. 728.

Moor

Moor *against* Pit. Case 168.

SPECIAL VERDICT IN EJECTMENT.—The case was this: A copyholder for life; the remainder for life. He in remainder for life surrenders the copyhold to the lord *pro tempore* (who was *a disseisor* only of the manor), *ut inde faciat voluntatem suam.* The disseisor grants it to a stranger for life. The disseisee enters. The stranger dies.

The surrender of a copyhold for life to a lord who is a *disseisor* of the manor, *ut inde faciat voluntatem suam* is void and does not extinguish the copyhold; but a surrender to the use of a stranger, though a disseisor, and admittance thereon, is good.

The question was, Whether the disseisor, or he in the remainder for life, who made the surrender, had the better title? So that the point was, Whether this surrender by a copyholder in remainder into the hands of the *disseisor* be good, and shall so extinguish the right to the copyhold, that it shall not be revived by the entry of the *disseisee* into the said manor?

It was said, that in some cases a surrender into the hands of a disseisor was good; that is, when the surrender is made to him to the use of another and his heirs, and he admits him, there the person admitted claims not under the lord, but under the copyholder who made the surrender; for nothing passes to the lord, but only to serve the limitation of the use, 1. *Roll. Abr.* 503. But in this case the grantee must claim from the lord himself, and not from the copyholder, because he had but an estate for his own life, with which he wholly departed when he made the surrender to the use of the disseisor himself.

S. C. 2 Jones, 153. S. C. 1. Vent. 359. S. C. Skin. 28. S. C. 2. Show. 153. S. C. 1. Freem. 245. Ante, 32. Co. Lit. 59. 4. Co. 24. 1. Roll Abr. 50.. 540. Moor, 236. 2 Leon. 45. Owen, 27. Cro Car. 205. 2. Sid. 151. Gilb. Te. Rep. 8. 13. 78. 96. 121. 235. Comy. 91. 10 Mod. 492. 2. Com Dig. "Copyhold" (C. 4.).

MAYNARD, *Serjeant*, in *Trinity Term* following, argued *on the other side*. There are two sorts of surrenders of a copyhold. —FIRST, Proper.—SECONDLY, Formal and ceremonious. If a surrender be to the lord to the use of another, this is no proper surrender; for no estate passes to the lord, he being only the instrument to convey it to the surrenderee, and this is but nominal. But here the surrender was to the use of the lord himself, which is a proper surrender, and in such case it is necessary that the lord have a reversion; for one estate is to be turned into the other, and there must be a continuing of estates. But *dominus pro tempore* who is *a disseisor* hath no such estate: EXECUTOR *de son tort* shall sue, but he cannot retain (*a*). * If therefore he is not capable to take a surrender to himself, unless he has such an estate, then here is no disseisin of the copyhold, it is only of the manor; and then no greater interest passes to the disseisor than to a stranger, whilst the true lord had been in possession; for so he is *quoad* this copyhold if he was not disseised of it; for if the copyholder had the possession, there could be then no *disseisin*; if he was out of possession, then he had nothing but a right, and that cannot be surrendered, for it must be an estate; as if a lessee for years keep possession, it is the possession of the lord, and the law is the same in case of a copyhold (*b*). The true owner makes a feoffment in fee; if lessee for years continue in possession, no freehold passes. If tenant at will of parcel of

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Bigot and Lord Salisbury's Case, Ant., 109.

(*a*) See ante, page 51, post. 293.
(*b*) See Bettesworth's Case, 2. Co. 31. S. C. Moor, 250.

the

Moor *against* Pit.

the manor be in possession, that prevents a disseisin of the freehold; much more in case of a copyhold. Lessee for years, the remainder to *B.* for life, the remainder to *C.* in fee; *C.* by deed makes a feoffment to *E.* and livery, &c. it is a void conveyance, because the possession of lessee for years is the possession of him in the remainder for life, and as long as the lessee for years is in the possession, the owner of the inheritance cannot be out, *Lit.* 324. *cap. Attornment.*

North, *Chief Justice* and Wyndham, *Justice*, inclined that the surrender was not good: for it was a material distinction where the surrender was made to the use of a stranger, and where it terminates in the lord; that a surrender made by a copyholder for life could not transfer, but extinguish his right; for he could not give a greater estate than he had; that there must be a reversion in the lord to make a surrender to him to be good; and that if a copyholder keep in possession, there could be no disseisin.

But Atkins, *Justice*, *contra.* That this surrender must have operation to extinguish his right; for though a copyholder for life cannot surrender for longer time than his own life; yet if a surrender be made of such a copyhold to an use it is good, and works by way of extinguishment of his right, though the use be void; and if a copyholder of inheritance surrender to a disseisor, *ut faciat voluntatem*, who regrants, to the said copyholder, an estate in tail according to the surrender, this shall bind the disseisee,
* [289] 1. *Roll. Abr.* 503. *pl.* 3.—*Tamen quære.* * The copyholder in this case might have sold his estate to the disseisor, and it had been good; and though the acts of a disseisor shall not prejudice the disseisee, yet he could see no reason why the copyholder, who had parted with his estate, should have it again (*a*).

(*a*) The court of common pleas was of opinion, that it was a void surrender, and the copyhold not extinguished, S. C. 1. Show. 153. and therefore gave judgment for the plaintiff. S. C. Skin. 28. A writ of error was brought in the king's bench, 1. Vent. 359.; and in Hilary Term the 33. & 34. *Car.* 2. the judgment was unanimously affirmed. S. C. T. Jones, 154.

Case 169. Taylor, on the Demise of Smith, *against* Biddall.

If a devise be made to *A.* the testator's sister and heir, "for "so long time and until her son *B.* attain the age of twenty-one years; and after he shall have "attained the said age, then to *B.* in fee; and if he die before his age of twenty-one years, "then to the heirs of the body of *C.* the father of *B.* and their heirs for ever; *A.* takes an estate for years, and the remainder in fee is immediately vested in *B.*; and if he die before he attains twenty-one years, and in the life-time of *C.* an only sister shall take the estate, either as heir to her brother, or as heir of the body of her father.—S. C. 1. Eq. Abr. 188. S. C. 2. Eq. Abr. 235. S. C. 1. Freem. 243. 1. Mod. 189. Abr. Eq. 128. Gilb. Eq. Rep. 36. 149. Prec. Chan. 15. 67. 72. 96. 338. 421. 1. Vern. 326. 462. 2. Vern. 325. 388. 430. 561. 660. 723. 8. Mod. 254. 346. 381. 9. Mod. 4. 28. 93. 101. 10. Mod. 419. 422. 11. Mod. 207. 12. Mod. 44. 52. 278. 283. 594. 1. Leon. 101. Cases Temp. Talb. 21. 41. 145. 1. Peer. Wms. 54. 142. 290. 511. 605. 2. Peer. Wms. 194. 331. 362. 390. 3. Peer. Wms. 258. 300. 304. Stra. 130. 133. 427. 958. 1175. Ld. Raym. 207. Cases. Temp. Talb. 3. 1. Atk. 472. 3. Com. Dig. 32. 41. 43. 2 Bl. Com. 173. 2. Bac. Abr. 73. 1. Burr. 230. 1. Bl. Rep. 520. 1. H. Bl. Rep. 32[illegible] Cowp. 40.

SPECIAL VERDICT IN EJECTMENT.—The case was thus: *Richard Ben* was seised in fee of the lands in question, and had a sister named *Elizabeth*, formerly married to one *Smith*, by

whom she had issue *Augustine Smith*, now lessor of the plaintiff; and she afterwards married one *Robert Wharton*, by whom she had issue a son called *Benjamin*, and a daughter called *Mary*, the now defendant.—*Richard Ben* devised these lands to *Elizabeth* his sister and heir, for so long time and *until* her son *Benjamin Wharton* should attain his full age of twenty-one years; and after he shall have attained his said age, then to the said *Benjamin* and his heirs for ever; and if he die before his age of twenty-one years, then to the heirs of the body of *Robert Wharton*, and to their heirs for ever, as they should attain their respective ages of twenty-one years. *Richard* the testator dies. *Benjamin* died before he came to the age of twenty-one years, living *Robert Wharton* his father. Afterwards *Robert* died. TAYLOR *against* BIDDAL.

The question was, Whether the lessor of the plaintiff as heir to *Elizabeth*, or *Mary* either as heir to her brother *Benjamin*, or as heir of the body of *Robert*, should have this land?

This case was argued by PEMBERTON, *Serjeant*, this Term, and by MAYNARD, *Serjeant*, in *Easter Term* following *for the plaintiff*; and they held that *Augustine Smith*, the lessor of the plaintiff, should have this land, because no estate vested in *Benjamin Wharton*, he dying before he had attained his age of twenty-one years, and the testator had declared, that his sister should have it till that time, and then and not before he was to have it; so that if he never attained that age (as in this case he did not), the land shall descend to the heir of the testator; that *Elizabeth* had only an estate for years, and so having no freehold the contingent remainder could not be supported; that *Mary* could not take by way of executory devise, because *Robert* was living when his son *Benjamin* died within age; that therefore it is *quasi* a condition precedent, *Grant's Case*, cited in *Lampet's Case* (*a*). * There is a difference between *Boraston's Case* (*b*) and this at the bar; for that was a devise to executors till *Hugh* shall attain his age of twenty-one years, and the mesne profits in the mean time to be applied by them for payment of the testator's debts; and because he might have computed how long it would be before his debts could be paid, therefore it was adjudged, that after the death of *Hugh* within age, the executors should continue in possession till *Hugh* might have attained his full age had he lived, and so a present devise to them. But here the devise is, generally, "till *Benjamin* "*Wharton* shall attain his age of twenty-one years," so that nothing vested in him until that time; and he dying before, then the estate shall descend to the general heir, who is the plaintiff.—SECONDLY, Admitting this should be taken as an *executory devise*, there must be some person capable to take when the contingency happens, and there was no such person in this case; for *Robert* was alive when *Benjamin* died, and *Mary* could not then take as heir of his body, for *nemo est hæres viventis*; like the case of *Pell v. Brown*, where *Brown* had issue *William* and *Thomas*, and he devises land to his youngest son *Thomas* and his heirs, and if he die (living *[290] Cro. Jac. 590. Vaugh. 272.

(*a*) 10. Co. 46. S. C. 2. Roll. 172. S. C. Winch's Entries, 426. Abr. 404, 405. 407. S. C. 2. Brownl. (*b*) 3. Co. 19.

 William)

TAYLOR *against* BIDDAL.

William) then to *William* and his heirs; *Thomas* did die without issue, living *William*; and it was adjudged, that if those words "living *William*" had been left out of the will, *Thomas* would have a fee tail, which he might have docked by a common recovery; but by reason of those words he had only a limited fee, because the words, *viz* "if he died without issue," are not indefinite to create a tail, but are restrained to his dying without issue "living *William*," which is a limited fee; and his estate being determined, *William* then had a fee; but if he had died before the contingency happened, *viz.* in the life-time of *Thomas*, and then *Thomas* had died without issue, the heirs of *William* would not have an estate in fee, for the reasons aforesaid. If therefore nothing vested in *Benjamin Wharton*, nor in *Mary* his sister, then the land descends to *Augustine Smith* as heir at law to *Elizabeth*, who was heir to the testator, and so the plaintiff hath a good title.

NEWDIGATE, *Serjeant*, *contra*. Here is only an estate for years in the sister of the testator, and an estate in fee presently vested in *Benjamin Wharton*; and he relied upon *Boraston's Case*; where the father having issue *Humfry* and *Henry*, devised to his executors till *Hugh* his grandson, the son of *Henry*, should be of age, and then to him in fee; it was there adjudged, that the executors had a term till *Hugh* might have attained his full age, and

[291] that * though he died at the age of nine years, yet the remainder did immediately vest in him in possession upon the death of his grandfather, and that by his dying without issue the lands did descend to his brother. So here the fee descends to *Benjamin Wharton* in possession, and he dying without issue and within age, the land shall then descend to his sister and heir. The like judgment was given in the case of *Taylor v Wharton* about twelve years since; and in *Dyer*, 124. a. a devise to his wife till his son shall be of the age of twenty-four years, then to the son in fee; and if he die before twenty-four years without issue, then to the wife for life, the remainder to *A.* &c.; the testator died; it was adjudged, that the son had a fee simple presently, for an estate tail he could not have till he was twenty-four years old; and after the death of his father, there was no particular estate to support that estate in the remainder till he should come to the age of twenty-four years, so that he took by descent immediately. So here a fee vested in *Benjamin* presently, and he being dead within age *Mary* may take as heir; however, when she is of age she shall take as heir of the body of *Robert* by way of executory devise arising out of the estate of the devisor, which needs no particular estate to support it, as in case of a contingent remainder; for before *Mary* was of age *Robert* her father was dead, and so she might well take, *Trinity Term*, 19. *Car.* 2. in the king's bench, *Snow v. Cutler*, *Roll* 1704.

The case of Taylor v Wharton, is reported in Carter, 182.

2. Leon 11 pl. 16. Dyer, 354.

Styles, 240. Owen, 148.

NORTH, *Chief Justice*. Favourable distinctions have been always admitted to supply the meaning of men in their last wills; and

and therefore a devise to *A. till* he be of age, then to *B.* and his heirs, is an estate for years in *A.* with a remainder in fee to *B.*; and if such a devise be made to *A.* who is also made executor, or for payment of debts, it shall be for a certain term of years, *viz.* for so long as, according to computation, he might have attained that age had he lived. Contingent remainders are at the common law, and arise upon conveyances as well as wills; one may limit an estate to *A.* the remainder to another; and so it may be by devise, if the intent of the parties will have it so. But as at the common law all contingent remainders shall not be good, so in wills no such latitude is given, as if none could be had; they are subject to the same fate in wills as in conveyances. * In this case, *Elizabeth* had a term till *Benjamin Wharton* was of age, for she is executrix; she was likewise heir at law to the devisor, and this land had gone to her had it not been for this will; so that it is plain the testator never intended that a fee-simple should vest in her, but somewhere else; for he could never intend the descent of the inheritance to that person to whom he had devised the term. It has been argued, that *Mary* is heir at law to *Benjamin*, as well as heir of the body of *Robert*, and so if she can take either way it is good; but to make her heir to *Benjamin*, it is necessary that the estate vest in him before he comes to twenty-one years; and for that *Boraston's Case* was much relied on, which was also said not to differ from this at the bar; that an estate passes to *Benjamin Wharton in præsenti*, and that there was no incapacity for *Mary* to take by way of executory devise, as was urged on the other side; and therefore why should she not take by way of executory devise as heir of the body of her father, or, at least, as heir of *Benjamin* her brother? An executory devise needs no particular estate to support it, for it shall descend to the heir till the contingency happen; it is not like a remainder at the common law, which must vest *eo instanti* that the particular estate determines; but the learning of executory devises stands upon the reasons of the old law, wherein the intent of the devisor is to be observed: for when it appears by the will that he intends not the devisee to take but *in futuro*, and no disposition being made thereof in the mean time, it shall then descend to the heir till the contingency happen; but if the intent be that he shall take *in præsenti*, and there is no incapacity in him to do it, he shall not take *in futuro* by an executory devise. A devise to an infant *in ventre sa mere* is good, and it shall descend to the heir in the mean time; for the testator could not intend he should take presently; he must first be *in rerum naturâ*. If an estate be given to *A.* for life, the remainder to the right heirs of *B.* this is a contingent remainder, and shall be governed by the rules of the law (*a*); for if *B.* die during the life of *A.* it is good; but if he survive it is void, because nobody can be his right heir whilst he is living; and there shall be no descent to the heir of the donor in the mean time to support this con-

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Ante, 9. 1. Sid. 153. pl. 2. 3. Inst. 50. Co. Lit. 390. Abr. Eq. 173. 202. 2. Vern. 711. 1. Peer. Wms. 246. 342.

(*a*) Co. Lit. 378. 3. Co. 20.

TAYLOR *against* BIDDAL.

contingent remainder, that so when *B.* dies his right heirs may take. In this case a fee did vest in *Benjamin* presently, and therefore after his death without issue the defendant is his heir, * and

* [293] hath a good title; if not as heir at law, yet she may take by way of executory devise as heir of the body of her father, which though it could not be whilst he was living (because *nemo est hæres viventis*), yet after his death she was heir of his body, and was then of age, at which time, and not before, she was to take by the will: that *Elizabeth* the general heir had only an estate for years till *Benjamin* should or might be of age.

And so, by the opinion of THE WHOLE COURT, judgment was given for the defendant.

Case 170.

Evered *against* Hone.

Construction of words in a devise.

Pollex. 404. Plowd. 23. Co. Lit. 378. 3. Com. Dig. 48. 4. Bac. Abr. 327.

SPECIAL VERDICT IN EJECTMENT; wherein the case was thus, *viz.* A man hath issue two sons, *Thomas* his eldest, and *Richard* his youngest son; *Thomas* hath issue *John*; *Richard* hath issue *Mary*. The father devised lands to his son *Thomas* for life, and afterwards to his grandson *John*, and heirs males of his body; and if he die without issue male, then to his grand-daughter *Mary* in tail, and charged it with some payments; in which will there was this PROVISO, *viz.* "Provided if my son *Richard* should "have *a son* by his now wife *Margaret*, then all his lands should "go to such first son and his heirs, he paying as *Mary* should "have done." Afterwards *a son* was born.

The question was, Whether the estate limited to *Thomas*, the eldest son, was thereby defeated?

And THE COURT were all clear of opinion, that this proviso did only extend to the case of *Mary's* being intitled, and had no influence upon the first estate limited to the eldest son.

Case 171.

Anonymous.

The executor or administrator of an EXECUTOR *de son tort*, is liable in the same manner as the testator or intestate would have been.

3. Mod. 117. Stra. 716. Ld. Ray. 1441. 1. Com. Dig. 266.

IN THE EXCHEQUER CHAMBER, before the Lord Chancellor, the Lord Treasurer, and two Chief Justices.—The case was thus:

The plaintiff had declared against the defendant as executor of *Edward Nichols*, who was executor of the debtor. The defendant pleads, that the debtor died intestate, and administration of his goods was granted to a stranger, ABSQUE HOC that *Edward Nichols* was ever executor; but doth not say, "or ever administered as executor," for in truth he was EXECUTOR *de son tort*. * The plaintiff replies, that before the administration granted to the stranger, *Edward Nichols* possessed himself of divers goods of the said debtor, and made the defendant executor, and died; and the defendant demurred; and judgment was given for the plaintiff;

* [294]

But

But reverſed here; for an executor of an EXECUTOR *de ſon tort* is not liable at law; though THE LORD CHANCELLOR ſaid, he would help the plaintiff in equity. But here adminiſtration of the goods of the debtor was granted before the death of the EXECUTOR *de ſon tort*, ſo his executorſhip vaniſhed, and nothing ſhall ſurvive (*a*). ANONYMOUS.

(*a*) By 30. *Car.* 2. c. 7. "All and every the executors and adminiſtrators of any perſon or perſons who, as executor or executors in his or *their own wrong*, or adminiſtrators, ſhall waſte or convert any goods, chattels, eſtate, or aſſets, of any perſon deceaſed to their own uſe, ſhall be liable and chargeable in the ſame manner as their teſtator or inteſtate would have been "if they had been living." And by 4. & 5. *Will.* & *Mary*, c. 24. ſ. 12. this ſtatute is extended to "all and "every the executor and executors, "adminiſtrator or adminiſtrators, of any "executor or adminiſtrator *of right* "who ſhall waſte or convert to his own "uſe goods, chattels, or eſtate, of his "teſtator or inteſtate."

The Lady Wyndham's Caſe. Caſe 172.

IF FLOTSAM come to land, and is taken by him who hath no title, the action ſhall be brought at the *Common Law*, and no proceedings ſhall be thereon in the *court of admiralty*; for there is no need of condemnation thereof, as there is of *prizes*: By the opinion of THE WHOLE COURT of common pleas.

Trover lies to recover *flotſam* wrongfully taken after it has come to land.

4. Inſt. 148.

1. Roll. Abr. 533. Ld. Ray. 388. 446. 473. 501. 12. Mod. 135. 1. Bac. Abr. 625. *notis*. 3. Term Rep. 335.

Roſe *againſt* Standen. Caſe 173.

IN ACCOUNT FOR SUGAR AND INDIGO; the defendant pleaded, that the plaintiff brought an *indebitatus aſſumpſit*, a *quantum meruit*, and an *inſimul computaſſet*, for one hundred pounds due to him for wares ſold; to which he pleaded *non aſſumpſit*, and that there was a verdict againſt him; and then avers, that the wares mentioned in that action are the ſame with thoſe mentioned here in the action of account: the plaintiff demurred.

If a plaintiff bring an *inſimul computaſſet*, when in fact there was no *account ſtated*, the defendant cannot plead a recovery in this action *in bar* to an action of *account* for the ſame cauſe.

And it was ſaid for him, that he had brought his former action on the caſe too ſoon; for if no account be ſtated, the action on the caſe on the *inſimul computaſſet* will not lie; and ſo the former verdict might be given againſt him for that reaſon.

But, on the contrary, the defendant ſhall not be twice troubled for the ſame thing; and if the verdict had been for the plaintiff, that might have been pleaded in bar to him in a new action.

But THE COURT were of another opinion, that this plea was not good, and that, if the plaintiff had recovered, it could not have been pleaded in bar to him; for if he miſ-conceive his action, and a verdict is againſt him, and then brings a proper action, the defendant cannot plead that he was barred to bring * ſuch action by a former verdict; becauſe where it is inſufficient, it ſhall not be pleaded

S. C. Ante, 42. S. C. 1. Mod. 207. S. C. 3. Keb. 844. Poſt. 318. Cro. Jac. 284. 1. Leon. 24. 2. Lev. 210. Fitzg. 314. 1. Barnes, 69. 10. Mod. 17. 210. 285.

Rose *against* Standen.

Antea. Putt and Roster, post. 318 Rosal and Lamper, ante, 42.

pleaded in bar; as in debt upon bond the defendant pleaded another action upon the same bond, and the jury found *non est factum*, the entry of the verdict was, that the defendant should recover damages *et eat inde sine die*, but not *quod querens nil capiat per breve*, so no judgment to bar him, *Cro. Jac.* 284. But pending one action another cannot be brought, for they cannot both be true. If no account be stated, the action on the case upon an *insimul computasset* would not lie; the *insimul computasset* implies an account; and upon *non assumpsit* pleaded, the defendant might have given payment in evidence; and for that reason the jury might find for him. It is true, he might have pleaded "*plene computavit*," which is the general plea. But it may as well be presumed, that the verdict was against the plaintiff, because the action would not lie; and the matter being *in dubio*, the Court will intend it against the pleader, he not having averred to the contrary.

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And so they held the plea to be ill.

Case 174.

* Osborn *against* Wright.

An action will not lie in the superior courts for calling a woman "*a whore*," unless it be the cause of some temporal damage.

ACTION ON THE CASE FOR WORDS, *viz.* The plaintiff declares that she was unmarried, but about to marry one *J. S.*; and that the defendant, to hinder her marriage, spoke these words of her, *viz.* "She is a whore, a common whore, and *N.'s* whore," *per quod maritagium amisit*.

The jury found the defendant guilty of speaking the words, but that she did not lose her marriage thereby.

1. Roll. Abr. 34. 36. Moor, 10. 29 Cro. Eliz 582. 1. Sid. 396. Cro. Jac. 473.

It was moved in arrest of judgment, that these words are not actionable, being only scolding.

And of that opinion was ALL THE COURT, and judgment was arrested.

499. Cro. Car. 393. Ray. 115. 1. Vent. 4. 1. Mod. 31. 3. Mod. 120. Stra. 471. 545. 555. 666. 936. 1169. 1200. 2. Barnes, 111. 124. Salk. 694. 1. Com. Dig. 193.

EASTER

EASTER TERM,

The Thirtieth of Charles the Second,

IN

The Exchequer.

Sir William Montague, *Knt. Chief Baron.*

Sir Edward Turner, *Knt.*
Sir Edward Thurland, *Knt.* } *Barons.*
Sir Francis Bramston, *Knt.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Hambleton *against* Justice Scroggs and Others. Case 175.

AN ASSAULT AND BATTERY was brought against the defendants in *the king's bench*, to which one of them pleaded, that he was *a serjeant at law*, and so ought to have his *privilege* to be sued by bill in *the common pleas*, and in no other court. To this plea the plaintiff demurred; and judgment was given in my LORD CHIEF JUSTICE HALE's time, by the opinion of him and the whole court of king's bench, FIRST, That a serjeant at law might be sued there, and was not suable in the court of common pleas only.—SECONDLY, That in this action the defendant should not have his privilege, because it was brought against him and another.

A SERJEANT AT LAW may be sued by original in any of the courts in *Westminster-Hall*; for his right to practise is not confined to the *common pleas*, and his privilege only relates to *inferior courts*.

And afterwards a writ of error was brought upon this judgment, returnable before the Lord Chancellor and Chief Justices * of the king's bench and common pleas, and the errors were argued before the two Chief Justices at *Serjeant's Inn* in *Chancery Lane*.

*[297]

S. C. 2. Lev. 129.
S. C. 3. Keb. 424.

Cro. Car. 84. Vaugh. 155. 2. Show. 287. Fitzg. 40. Stra. 191. 546. 738. 822. Ld. Ray. 399. 869. 868. 1556. 1. Com. Dig. 4. 1. Bac. Abr. 5. 4. Bac. Abr. 37. 220. 223. Fort. 344. Barnes, 266.

MR.

HAMBLETON *against* JUSTICE SCROGGS AND OTHERS.

MR. HOLT, *for the plaintiff* in the writ of error, that *a serjeant at law* is to be sued only in the court of *common pleas*, and not elsewhere, because there is an absolute necessity of his attendance there: he is sworn, and no other person can plead at that bar; and therefore if he should be sued in any other court, it would be an impediment to the business of that court, where not only the officers, but their servants, have privilege. In the eleventh year of *Edward the Fourth* (*a*) there was some discourse about the privilege of serjeants at law, when it was held, that he is not to be sued in that court by *bill*, but by *original*; but either way he is to have his privilege. So the servant of an officer is not to be sued by bill, but he is still to have the privilege of the court; and so had *Serjeant Hedley's* clerk in the reign of *King Charles the First* (*b*). The serjeants receive a kind of induction to the bar, and have a place assigned them; and that they ought to have privilege, the very words of the writ are observable, *viz.* (mentioning a serjeant at law) "*ex officio incumbit in curiâ illâ.*" And though it hath been said, and given as an answer to that case in *Cro. Car.* that where the serjeant's clerk was arrested in an *inferior court* (as in that case he was), there he shall have privilege, but not against the other great courts in *Westminster-Hall*; this is a difference never yet taken notice of in any Book, nor doth the writ warrant this distinction.—SECONDLY, He shall have his privilege though he be joined with another, because the action is joint and several; and the one may be found guilty and the other acquitted; and it would be an easy way to oust a man of his privilege, if it might be done by joining him with another who hath none, 14. *Hen.* 4. *pl.* 21. But the person with whom the serjeant is joined, may be sued in the common pleas likewise; so that he shall not hinder him from having privilege who of right ought to have it, 10. *Edw.* 4. *pl.* 15.

OFFLEY, *contra.* As to THE FIRST POINT the court of *king's bench* agreed, that *a serjeant at law* shall always have the privilege of the court of *common pleas* against all *inferior courts*, but not against the other courts in *Westminster-Hall*; for he may
* [298] be sued in any of them. * A serjeant is not like the common officers of the court, for they are to be attendant there and no-where else; but a serjeant at law is not confined to that court alone; he may be assigned of counsel in any other court, and doth usually put his hand to pleas both in *the king's bench* and *the exchequer*; but a filazer (*c*) or attorney (*d*) of that court cannot practise in his own name in any other. All cases of privilege ought to be taken strictly. And that which was cited concerning the privilege of a serjeant's clerk is not like this, because the arrest was in an inferior court. In the 11. *Edw.* 4. *pl.* 2. b. the Chief Justice of the *king's bench* came to *the common pleas* bar, and told a serjeant who he had assigned for a pauper,

(*a*) Year-Book 11. *Edw.* 4. pl. 2.
(*b*) Cro. Car. 84.
(*c*) Barnes, 371.
(*d*) Fort. 343. Salk. 1.

that

that if he would not come into that court and plead for his client he would forejudge him; so that if he could be fetched out of the common pleas and carried to the king's bench, he is not confined to that court alone. In the 5. *Hen.* 5. *nu.* 10. complaint was made, that the subjects of the king were not well served in his courts; the parliament thereupon ordered, that one *Martin* and others should take upon them the dignity of *serjeants at law*; so that it appears that their business lies in other courts as well as in that of the common pleas.—As to THE SECOND POINT, Here is a joint action, for any thing that appears to the contrary, and the plaintiff may proceed against one in the *king's bench*, and therefore the other shall be ousted of his privilege (if he have any) in the *common pleas*, *Moor*, 556. 20. *Hen.* 6. *pl.* 32.

HAMBLETON *against* JUSTICE SCROGGS AND OTHERS.

2. Roll. Abr. 275. pl. 4.

NORTH, *Chief Justice*, said, That he always took it to be an uncontroverted point, that *a serjeant at law* should be sued only in the court of *common pleas* by *bill*; he is bound by oath to be there; and when he brings a writ of privilege, it is always out of that court, and no other.—*Curia advisare vult.*

* The Attorney General *against* Sir John Read.

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Case 176.

In the Exchequer.

INFORMATION.--A special verdict was found: the case was thus:

Sir John Read on the first of *April* in the twenty-fourth year of *Charles the Second* was, by sentence in the spiritual court, divorced *à mensâ et thoro*; and, for non-payment of *alimony*, was *excommunicated*. Afterwards it was enacted by the statute of 25. *Car.* 2. c. 2. "That all and every person or persons who shall "have any office, civil or military, shall take the oaths of supre- "macy and allegiance, and receive the sacrament (within the "time limited by the said act), or otherwise shall be adjudged *ipso* "*facto* incapable and disabled by law; or if he execute any office "after his neglect or refusal to qualify himself within the time "therein appointed (*viz.* three months), then he shall be dis- "abled to sue in any court, and shall forfeit the sum of five hun- "dred pounds." *Sir John Read* was made high-sheriff of *Hertfordshire* on the 12. *November* 25. *Car.* 2. and being still under the sentence of excommunication, he took upon him the office, and executed it for three months, *viz.* to the 12th day of *February* afterwards, and then refused to serve any longer. The Judges came soon after to keep the assizes for that county, but there was no sheriff there to attend them; and the reason was, because if he had executed the office without taking the oaths (the time being now expired wherein he ought to have taken the same), then he had subjected himself to the forfeiture of five hundred pounds, and he

An information lies against a person for not taking upon him the office of sheriff, although at the time of his election he is under sentence of excommunication, and thereby rendered incapable of receiving the sacrament required by the statute of 25. *Car.* 2. c. 2.; for it is incumbent on such person to remove the disability.

S. C. Trem. 559. Dyer, 61. 2. Vent. 247. Comyns, 307. 4. Mod. 269. 10. Mod. 65. 101. 161. 359. 12. Mod. 67. Stra. 1193. Salk. 167. 1. Ld. Ray. 29. 4. Bac. Abr. 431. 1. Hawk. P. C. 17.

THE ATTORNEY GENERAL *against* SIR JOHN READ.

he could not receive the sacrament because he was excommunicated; and therefore supposed, that after the three months he was *ipso facto* discharged by the aforesaid statute.

The question was, Whether upon all this matter the defendant be guilty?

WARD, and SIR WILLIAM JONES, *Attorney General*, argued that the defendant was guilty.—FIRST, The oath and sacrament are necessary qualifications for all sheriffs, because the act appoints these things to be done, and the penalty therein extends to those who execute any office after the three months without doing the same, but not to such who neglect to qualify themselves. And though it may be objected, that the act gives no penalty for not
*[300] taking of the oath, it only enjoins it to be done, and * subjects the person to the forfeiture of five hundred pounds for executing an office after three months, that being not done, so that this is not to be punished by information, it being no offence at the common law; yet if an act appoint a thing to be done, the transgressing of the law is an offence at the common law, and ought thus to be punished; and so it was adjudged in *Castle's Case*, *Cro. Jac.* 643. Suppose the defendant had given bond to perform a thing, a discharge by the act of God, or by the obligee, had been good; but the obligor should never disable himself; and if it be so in private contracts, much more in the case of the king, because our duty to him is of the highest nature.—SECONDLY, Therefore the excommunication can be no excuse to the defendant; for though he might have been excused if he had been under a legal disability, which he could in no wise prevent (*a*), yet here he was able, and had time enough, and it was in his power to have discharged himself from this excommunication; and being bound by his duty and allegiance to the king to perform the office, he ought to qualify himself for the performance, and either to remove the disability, or shew he had not power to do it. It is his obstinacy that disables him, and it is absurd to think that this excommunication, which was designed as a punishment, should now be an ease to him to excuse him from executing this office, *Moor* 121. *Lacie's Case*.—THIRDLY, The defendant is punishable for this neglect, otherwise the king would lose the effect of his subjects service, if it should be in their power to discharge themselves at pleasure: an act of parliament cannot, and much less the defendant himself by his own act, take away his duty and service which he owes to the king; and therefore though it is enacted that a sheriff shall be only for one year, yet it has been adjudged that the king by a *non obstante* may dispense with that statute, because otherwise he would be deprived of the service of his subjects. If a sheriff, when he is first admitted into his office, refuse to take the oath of his office, he is finable, and so he ought here: if any alteration be made by the king of that oath, his disobedience

See Crofton's case, 1. Mod. 23. note (*b*).

1. Roll. Abr. 251. 455.

Ante, 261, 2.

Cro. Car. 26.

(*a*) See the case of Harrison *v.* Evans, 2. Burn's Ecc. Law, 168. Cowp. 393. 535. *notis*; and 1. Hawk. P. C. 10.

afterwards

afterwards is punishable, though a form of the oath is prescribed by the act of parliament: and there is no other way to punish the defendant in this case but by information; for after the three months (in case he execute the office not being qualified) the act gives the penalty to the informer; and if he should not execute it the inconvenience would be great, because it is an office which concerns the administration of justice, * and necessary for the management and collection of the king's revenue. The statute extends to offices of trust as well as of profit, and enjoins the thing to be done, the transgression whereof is an offence, as well at the common law as against the statute, and so punishable by information. And therefore they prayed judgment against the defendant.

THE ATTORNEY GENERAL *against* SIR JOHN READ.

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SAWYER and LEVINZ *contra*. They agreed, if the subject be qualified he ought to accept the office; but the defendant was not so qualified, and therefore to be excused. But before they entered upon the debate whether this was an offence or not, they took an exception to the form of the information.

Mod. 30. 104. 117. 223. 446. 502. 634. Ld. Ray. 150. 343. 682.

FIRST, That it was not good, because it did not conclude *contra formam statuti*; for if the offence be at the common law, and a new penalty is given by the statute, the proceedings ought to be either at the common law by way of fine, or upon the statute for the penalty; but if the offence be by the statute, then it must be laid to be *contra formam statuti*. Now if this was any offence in the defendant, it was because he did not receive the sacrament and take the oath, which is an offence against the statute, and therefore ought to conclude *contra formam statuti*, which is essential. Then as to the substance:

See on this Subject 2. Hawk. P. C. ch. 25. sect. 116.

SECONDLY, The information is insufficient, for there is no offence at all of which the common law doth take notice; and though the consequences of the thing done may be bad, yet no man shall be punished for that, because those only aggravate the offence, if any. Neither is this information true, for it saith he refused *absque rationabili causa*, but here was a reasonable cause: and though it may be objected, that it was only *impotentia voluntatis*, and that every subject being disabled is to remove that disability to serve the king, this was denied; for a man who is a prisoner for debt is not bound or compellable to be sheriff, neither is a man bound to purchase lands to qualify himself to be either a coroner or justice of the peace. By the statute of 3. *Jac.* c. 5. every *recusant* is disabled; he may conform, but he is not bound to it, for if he submit to the penalty, it is as much as is required by law: it is true, a subject is bound to serve the king in such capacity as he is in at the time of the service commanded, but he is not obliged to qualify himself to serve in every capacity: neither doth it appear in this case, that the defendant was able to remove this incapacity, and that should have been shewn on the other side, and all Judges are to judge upon the record. * The intent of the statute is, that if persons will not qualify themselves, they

See 1. Hawk. P. C. chap. 12.

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THE ATTORNEY GENERAL *against* SIR JOHN READ.

they shall not execute any office; and it was made to keep Roman Catholics out of places, but not to force them to accept of offices of trust in the Government; and it designs no punishment for quitting, but for executing of a place contrary to the law. But if this be an offence, this information will not lie: and for that,

Ante, 128. 25. *Hen.* 6. pl. 9. b. 7. *Hen.* 4. pl. 5. Fitzg. 47. 65. 10. Mod. 121. 337. 358. 364. 409. 12. Mod. 30. 99. 104. 117. 223. 446. 502. 634. Stra. 516. 828. Ld. Ray. 347. 991. 3. Com. Dig. 520, 521.

THIRDLY, It was argued, that if a thing be either commanded or forbidden by a statute, the transgression in either case is an offence punishable by information; but when an act doth not generally command a thing, but only *sub modo*, the party offending is punishable no otherwise than designed by that law; as where the statute of 18. *Hen.* 6. *c.* 11. prohibits any man from being a justice of the peace, unless he have forty pounds *per annum*, and the statute of 5. & 6. *Edw.* 6. *c.* 16. which makes such bargains as are therein-mentioned about buying of offices void, if such office be forfeitable, then an information will lie; but when it is *ipso facto* void, as in both the former cases, then it is otherwise, because the punishment is executed by the statute itself; and therefore where the avoidance is made by the act, there is no need of an information. And the objection of *impotentia voluntatis* is not material to this purpose; because simony, buying of offices, not subscribing the Thirty-nine Articles according to the statute of the queen, these are all voluntary acts, yet no information lies against such offenders, because the statutes execute the punishment. The intent of the parliament is here declared; the disability of the person makes the office void; void to all intents, for the right of infants or men in prison is not saved; so that admitting it to be an offence if the duty be not performed, yet if such a qualification be requisite to make a man to act in such an office, or perform such a duty, if that qualification be wanting, the party is only punishable by the loss of the office. The act doth not distinguish between offices of trust and profit. And as to the other objection, *viz.* that it is in the power of the defendant to qualify himself, the same might as well be objected against all the popish recusants, upon the statute of 3. *Jac.*; and if a statute doth disable persons or abridge the king of their services, there is no injury done, because the king himself is party to the act; but if mischiefs were never so great, since they are introduced by a law, they cannot be avoided till that law is changed.

FOURTHLY, But admitting the information to be good, and that this is an offence for which it will lie (*a*), yet the excommuni-
[303] cation is a * sufficient excuse. It appears by the verdict, that the defendant was absolutely disabled to be sheriff; for if he is to take the oath and receive the sacrament in order to it, if he cannot be admitted to the sacrament, as being under the sentence of

(*a*) See the case of Rex *v.* J. Woodrow, 2. Term Rep. 731. where the Court granted an *information* against a person for refusing to take upon him the office of sheriff, because the vacancy of the office occasioned a stop of public justice, and *the year* would be nearly expired before an *indictment* could be brought to trial.

excom-

excommunication, that is an excuse. The defendant is only argued into a guilt, for the jury have not found any. They do not say, that it was in his power to yield obedience, or that he might have enabled himself; they only find his incapacity; and though it was a voluntary act which was the cause of his disability, yet in such cases the law does not look to causes so remote. If a man be in prison for debt, it is his own act for contracting it and not paying; but yet an outlawry against him whilst in prison shall be reversed, because the immediate cause, *viz.* the imprisonment, and the judgment, was *in invitum*, and the law looks no farther.

The Attorney General against Sir John Read.

And so judgment was prayed for the defendant.

But THE COURT were all of opinion, that this information would lie, and that the defendant was punishable for not removing the disability, it being in his power to get himself absolved from the excommunication.

And so judgment was given against him, and a writ of error brought, &c.

EASTER TERM,

The Thirtieth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Juſtice.*

Sir Hugh Wyndham, *Knt.*
Sir Robert Atkins, *Knt.* } *Juſtices.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Godfrey *againſt* Godfrey. Caſe 177.

Hilary Term, 30. *Car.* 2. *Roll* 321.

DEBT UPON A BOND for performance of an award, in which the arbitrators had taken notice of ſeventy-two pounds in controverſy, and had awarded fifty pounds in ſatisfaction: the defendant pleads "*nullum fecerunt arbitrium.*" The plaintiff replies "*an award,*" and ſets it forth, and aſſigns a breach.

On a ſubmiſſion to arbitration reſpecting *ſeventy two pounds* due for rent, an award that the party ſhall pay *fifty pounds* in full ſatisfaction of the *ſeventy-two pounds* is good.

Cro. Jac 447. Abr. Eq. 50. 1. Com. Dig. 387.

The defendant demurred; becauſe it appeared by the award, that ſeventy-two pounds was in controverſy for rent due, and that fifty pounds was awarded in full ſatisfaction of ſeventy-two pounds, and general releaſes to be given. But it did not appear that any other matter was in controverſy between the parties, though the ſubmiſſion was general; and arbitrators may reduce uncertain things to a certainty, but they cannot make a debt certain to be leſs, except there were other differences, for which likewiſe this releaſe was to be given, 10. *Hen.* 7. *pl.* 4.

But THE WHOLE COURT were of opinion, that the award was good, for that the arbitrators might conſider other matters be-

GODFREY *against* GODFREY.

tween the * parties. Neither did it appear by the award, that the seventy-two pounds was due, but in demand only; and it is unreasonable for him to find fault with his own ease; for he alledges that he ought to pay seventy-two pounds, and complains because the other party is contented with fifty pounds, and demands no more. Judgment for the plaintiff.

Case 178.

Wright *against* Bull.

Where a condition is *disjunctive*, it is in the election of the party to have either.

S. C. 2. Danv. 79. Ante, 200. 2. Roll. Abr. 444. Owen, 52. 1. Mod. 265. Cro. Jac. 504. 1. Bac. Abr. 432. 3. Bac. Abr. 708.

DEBT UPON A BOND, for payment of forty pounds, the condition whereof was, "That if the defendant should work "out the said forty pounds at the usual prices in packing, when "the plaintiff should have occasion for himself or his friends "to employ him therein, or otherwise shall pay the forty pounds, "then the bond to be void."

The defendant pleads, that he was always ready to have wrought out the forty pounds, but that the plaintiff did never employ him.

And upon demurrer the plea was held ill, because the defendant did not aver, that the plaintiff had any occasion to make use of him; and for that it was at his election either to have work or money; and not having employed him, but brought his action, that is a request in law; and so he hath determined his election to have the money.

And judgment was accordingly given for the plaintiff.

Case 179.

Blackbourn *against* Conset.

In replevin the place where shall be *intended* where the land lies.

IN REPLEVIN the avowant pleads an execution taken out, and that a term for years was extended, and an assignment thereof made by the sheriff, but alledges no place where the assignment was made:—but upon demurrer IT WAS HELD good; for it shall be intended to be assigned where the land doth lie.

Dyer, 15. Cro. Eliz. 898. 880. Hard. 187. 61. Cro. Jac. 555. Stra. 507. 595. 614 646. 775. Ld. Ray. 258. 276. 1040. 1214. 1. Salk. 2. 6. Lutw. 239.; and see the 16. & 17. *Car.* 2. c. 8.

Case 180.

Hall *against* Carter.

A bond given to a plaintiff by a third person, conditioned that the person arrested shall give such security as the plaintiff shall approve, or render his body at the return of the writ, is not within the 26. *Hen.* 6. c. 10.—Cro. Eliz. 178. 1. Sid 132. Pop. 165. T. Jones, 95. Ander. 267. 10. Mod. 53. 85. 139. 327. 11. Mod. 93. 208. 4. Bac. Abr. 464. 1. Saund. 161. Burr. 2683. 1. Term Rep. 418.

IN AN ACTION OF DEBT UPON A BOND the defendant craves *oyer* of the condition, which was, That if another person (who was arrested at the suit of the plaintiff, and for whom the defendant was now bound) should give such security as the plaintiff should approve of for the payment of ninety pounds to him, or should render his body to prison at the return of the writ, then the

obligation

obligation to be void. * The defendant pleads the statute of 23. *Hen.* 6. c. 10 (*a*), that this bond was given *for ease and favour*. HALL *against* CARTER.

And this case coming to be argued upon a demurrer, the question was, Whether such bond be within the statute or not?

And THE COURT were of opinion, that it was not. If the sheriff take bond in another man's name, to elude the statute, such bond is void; but the plaintiff may give directions to the officer to take such bond as this to himself; it is only an expedient to prevent a new arrest, and the agreement of the plaintiff makes it good. If a *capias* be taken out against the defendant, and a third person gives the plaintiff a bond, that the defendant shall pay the money, or render himself at the return of the writ, it is a good bond, and not within the statute, because it is not by the direction of the officer, but by the agreement of the plaintiff; and there is no law that makes the agreement of the parties void; and if the bond was not taken by such agreement, it might have been traversed.

But ATKINS, *Justice*, doubted, because a bond to render himself a prisoner is void, *Bewsage's Case*, 10. *Co.* 101. But if it had been to pay the money, or appear at the return of the writ, it had been good. But, notwithstanding, judgment was given for the plaintiff (*b*).

(*a*) It is not necessary to plead this statute; for it is at length decided to be a public act, of which the Court will take notice though not pleaded. Samuel *v.* Evans, 2. Term Rep. 569.

(*b*) The distinction is, that where the undertaking is given to *the sheriff*, the form directed by the 23. *Hen.* 6. c. 10. must be strictly pursued; and therefore an agreement in writing to put in good bail for a person arrested on *mesne process* at the return of the writ, or surrender the body, or pay debt and costs, made by a third person with *the bailiff* of the sheriff, in consideration of discharging the party arrested, is void. But when the undertaking is given to *the plaintiff*, it is not within the statute; and therefore the undertaking of *an attorney* for the appearance of a defendant is not void, because it is given to *the plaintiff* in the action, and not to the sheriff. Rogers *v.* Reeves, 1. Term Rep. 418.

Shaxton *against* Shaxton.

Case 181.

THE CONDITION OF A BOND was, That the defendant should save harmless *Thomas Shaxton*, and the mortgaged premises, and should pay the interest for the principal sum.

Non damnificatus is not a good plea where the person and lands are to be indemnified.

The defendant pleads, that *Thomas Shaxton non fuit damnificatus*; for that the defendant had paid the one hundred and twenty pounds principal money, with all the arrears of interest due at such a day.

Antea, 240.

And upon a demurrer this was held no good plea; because the first matter *non damnificatus* goes to the person, and not to the premises. And so judgment was given for the plaintiff.

Moor, 591. Gilb. Eq. Rep. 253. 8. Mod. 318. 11. Mod. 78. 12. Mod. 406. 413. Stra. 400. 681. Ld. Ray. 106. 968. 1140. 1416. Annally's Rep. 322. 2. Wilf. 5. Andr. 28. 2. Burr. 944. 5. Com. Dig. "Pleader" (2. W. 33.).

Case 182. *** Anonymous.**

If an *indictment* be preferred for a trespass, and the party be *acquitted*, it shall be intended to have been *malicious*; and therefore an action on the case will lie against the prosecutor.
Ante, 52.
1. Sid. 465.
8. Mod 307.
12. Mod. 4. 208. 257. 273. 542. 555.
Stra. 114. 691.
Ld. Ray. 377. 381.
Dougl. 215.

THE DEFENDANT was *indicted* for a *common trespass* (*a*), and acquitted; and now was plaintiff in an action on the case against the prosecutor.

And by the opinion of THE CHIEF JUSTICE the action will lie for the charges and expences in defending the prosecution, which the acquittal proves to be false, and the indicting him proves to be malicious; for if he had intended any-thing for his own benefit or recompence, he might have brought a civil action; and then if he had been found *not guilty*, he would have had his costs allowed. Though the prosecution be for a trespass for which there is a probable cause, yet after acquittal it shall be accounted malicious; the difference only is where the indictment is for a criminal matter: but where it is for such a thing for which a civil action will lie, the party can have no reason to prosecute an indictment; it is only to put the defendant to charges, and to make him pay fees to the clerk of the assizes.

(*a*) See the case of Norris *v.* Palmer, ante, 52. where an action was brought on an indictment for a *common trespass*. But it seems now to be settled, that an *indictment*, though the offence be laid to be done *vi et armis*, will not lie for a *common trespass*; Rex *v.* Stove, 3. Burr. 1698.; Rex *v.* Blake, 3. Burr. 1731. See also Rex *v.* Samon, 1. Burr. 516. and 2. Hawk. P.C. c. 25. s. 2. In the case of Jones *v.* Gwyne, however, on an action for a malicious prosecution, the Court said, that the matter being indictable or not indictable made no difference; since a person being falsely and maliciously indicted for a matter not indictable, is put to the same expence and trouble as if it were a matter indictable, and the malice of the prosecution thereby heightened, 10. Mod. 149. for it shews, that it was groundless, and without probable cause. S. C. 10. Mod. 214. S. C. Gilb. Cases, 185. It is also determined, that an action for a malicious prosecution will lie, although the indictment be *faulty*; and therefore the indictee in no danger of being *found guilty*; for a bad indictment, even where the subject matter is indictable, serves all the purposes of malice, by putting the party indicted to expence, and exposing him, Chambers *v.* Robinson, 1. Stra. 691.; and therefore, although the defendant be *acquitted* on a defect of the indictment, an action for a malicious prosecution will lie, Wick *v.* Teutham and Another, 4. Term Rep. 247. : but to support this action both *malice* and the want of *probable cause* are necessary, Johnston *v.* Sutton, 1. Term Rep. 493.; and it must appear upon the declaration, that the prosecution is terminated; Fisher *v.* Bristow, Dougl. 215. See also Savil *v.* Roberts, 1. Ld. Ray. 374.; Cooper *v.* Boot, 1. Term Rep. 535.; Morgan *v.* Hughes, 2. Term Rep. 231.

Case 183. Penrice and Wynn's Case.

A *habeas corpus ad subjiciendum* must be granted on motion; but a *habeas corpus ad satisfaciendum*, &c. is granted of course.

MAYNARD, *Serjeant*, moved for a *habeas corpus* for them, being committed to THE POULTRY COMPTER by the commissioners of bankrupts, for refusing to be examined and sworn touching their knowledge of the bankrupt's estate. The process against them in this court was an *attachment of privilege*, which was a civil plea, and of which the Court had jurisdiction, and therefore the *habeas corpus* must be granted.

Ante, 198. 1. Mod. 235. Vaugh. 154. 2. Jones. 13. 17. 1. Lev. 1. Tidd's Practice, 168. 3. Bac. Abr. 9.

THE CHIEF JUSTICE said, that it might be without motion, because all the *habeas corpus's* in that court were *ad faciendum et recipiendum*, and they issue of course; but in the king's bench they are *ad subjiciendum*, which are in criminal causes, and not to be granted without motion (*a*).

PENRICE AND WYNN'S CASE.

Then THE SERJEANT moved, that the sheriff might return his writ, which was done; and being filed, he took exceptions to the return, by which the ground of the commitment appeared to be by virtue of a warrant under the hands and seals of the commissioners, &c. which he said was ill for want of an averment of their refusal to come and be sworn; for it did not appear that they did refuse, and they ought not to be committed without refusing; so that should have been positively averred, *viz.* that they did refuse and still do; for if they are * willing at any time, they ought to be discharged.

Commissioners of bankrupts warrant to commit for not disclosing, &c. must aver, that the party was summoned and refused to attend.

* [307]

And so they were, but were ordered to put in bail upon the attachment.

5. Mod. 309. Comb. 391. 2. Stra. 880. 2. Bl. Rep. 1144. Cooke's Bankrupt Laws, 160. 486.

(*a*) See 31. *Car.* 2. c. 2. and Wood's Case, 3. Wils. 172.

Abbot *against* Rugeley.

Case 184.

THE PLAINTIFF declared in an action of assault and battery; to which the defendant pleaded not guilty; and, at the assizes, a plea was put in *puis darrein continuance*, and a demurrer thereunto.

Plea *puis darrein continuance* must be certified as part of the record of *nisi prius*.

THE COURT were clear of opinion, that if the plea had been issuable, it could not have been then tried; neither could the demurrer be there argued, but must be certified up hither by the Judge of assize, as part of the record of *nisi prius*, *Yelv.* 180. *Hawkins v. Moor.*

S. C. 1. Freem. 252. Cro. Jac. 261. Stra. 493. Bull. N. P. 309. 4. Bac. Ab. 144.; and see the case of Lovel *v.* Eastoff, 3. Term Rep. 554.

Ballard *against* Oddey.

Case 185.

IT was ruled in this case, That to avoid *a security* by reason of *usury*, the *contract* itself must be usurious; for if the party take afterwards more than is allowed, that will not make it so; so that if the agreement of the parties be honest, but made otherwise by the mistake of a scrivener, yet it is not usury (*b*): as if a mortgage be for

The *contract* itself must be usurious to make it void.

S. C. 1. Mod. 69. S. C. 1. Saund. 295. 2. Vent. 83. Jones, 396. Cro. Car. 501. Cro. Jac. 33. Yelv. 47. Cro. Eliz. 642. 1. Mod. 69. 1. Saund. 294. 3. Salk. 390. 1. Vern. 141. 2. Vern. 170. 402. Comyns, 583. 10. Mod. 449. 11. Mod. 1-4. 12. Mod. 385. 493. 517. Cases Temp. Talb. 39. 1. Stra. 498. 633. 2. Stra. 816. 1043. 1243. 5. Com. Dig. 648. Cowp. 114. 3. Atk. 154. 1. Hawk. P. C. 530, 531. 1. Brown. C. C. 93. 3. Wils. 396. 1. H. Bl. Rep. 462. Cowp. 112. Dougl. 235. 736.

(*a*) See 3. Atk. 154. 1. Hawk. P. C. 530. Floyer *v.* Edwards, Cowp. 114.; Ld. Linham *v.* Child, 1. Brown's Chan. Rep. 93.; Morse *v.* Wilson, 4. Term Rep. 353. and 1. H. Bl. Rep. 462.

BALLARD *against* ODDEY.

one hundred pounds, with a proviso to be void on payment of one hundred and six pounds at the end of one year, and no covenant for the mortgagor to take the profits till default be made in payment, so that in strictness the mortgagee is intitled both to the interest and the profits, yet if this was not expressed, the agreement is not usury.

TRINITY TERM,

The Thirtieth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*
Sir Hugh Wyndham, *Knt.* } *Justices.*
Sir Robert Atkins, *Knt.* }

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

* [308]

* The Case of one Randal and his Wife, an Administrator, &c. Case 186.

Judgment may be avoided without a writ of error, by a plea, where the paarty is a stranger to it.

1. Roll. Abr. 742.
Cro. Eliz. 199.
Vaugh. 94.
Gilb. Eq. Rep. 220. 308.
2. Bac. Abr. 190, 191.
4. Bac. Abr. 421.

DEBT UPON A BOND against the defendant as administrator: they plead a *judgment recovered* against the intestate in *Hilary Term* 26. & 27. *Car.* 2. and that they had not assets *ultra.* The plaintiff replies, That there was an action against the intestate, but that he died before judgment, and that after his death judgment was obtained, and kept on foot *per fraudem.* The defendant traversed the fraud, but did not answer the death of the intestate; and the plaintiff demurred.

It was said *for the plaintiff*, that the judgment was ill, and that he being a stranger to it could neither bring a writ of error or deceit, and had no other way to avoid it but by plea; and that it is put as a rule, That where judgment may be reversed by a writ of error, the party shall not be admitted to do it by plea; but a stranger to it must avoid it by plea, because he is no party to the judgment: as if a *scire facias* be brought against the bail, it is a good plea for them to say, that the principal was dead before judgment given, by way of excusing themselves to bring in the body; but it is not good to avoid the judgment, because it is against

THE CASE OF RANDAL AND HIS WIFE.

against the record, which must be avoided by writ of error, 1. *Roll. Abr.* 449. 742.

THE COURT were of opinion, That the plaintiff might avoid the judgment without a writ of error; especially in this case, where it is not only erroneous, but void.

* [309]

Case 187.

Hill *against* Thorn.

A breach of award must only be assigned of what is submitted.

IN an arbitrament it was held by the Court, FIRST, That if two things be awarded, the one within and the other not within the submission, the latter is void; and the breach must be assigned only upon the first.

Godb. 165. 12. Mod. 585. 3. Bulst. 313. 2. Keb. 601. Ld. Ray. 114. 123.

The Court will not presume an award is beyond the submission.

SECONDLY, If there be a submission of a particular difference, and there are other things in controversy, if in such case a general release is awarded it is ill, and it must be shewed on the other side to avoid the award for that cause.

1. Roll. Abr. 21. 6. Mod. 232. 1. Sid. 154. Hob. 190. 2. Term Rep. 645.

THIRDLY, If the submission be of all differences till the 10th day of *May*, and a release awarded to be given of all differences till the 20th day of *May*, if there be no differences between those two days the award is good; if any, it must be shewed in pleading, otherwise the Court will never intend it.

Reciprocal covenants cannot be pleaded in bar.

FOURTHLY, That reciprocal covenants cannot be pleaded one in bar of another (*a*), and that in the assigning of a breach of covenant it is not necessary to aver performance on the plaintiff's side (*b*).

(*a*) But see the case of Johnston *v.* Car, 1. Lev. 152. 3. Lev. 41. 1. Show. 391. 1. Bac. Abr. 551. 4. Bac. Abr. 16.

(*b*) 5. Co. 78. Cro. Jac. 645.

Case 188.

Staples *against* Alden.

If a condition be to deliver so many shoes to *A.* a common carrier, for the use of the obligee, a delivery of them to *the servant* of *A.* is sufficient, and *the master* shall be bound by it.

DEBT UPON A BOND conditioned to deliver forty pair of shoes within a month at *Holborn-Bridge* to *Henry Knight*, a common carrier, to *G.* for the use of the obligee. The defendant pleaded, that in all that space of a month *Henry Knight* did not come to *London*, but that such a day at *Holborn-Bridge* he delivered forty pair of shoes to *A. G.* the carrier's porter.

Abr. Eq. 308. 1q Mod. 110. 423. 11. Mod. 87. 267. 12. Mod. 488. 564. Stra. 480. 505. 653. Ld. Ray. 792. 3. Bac. Abr. 709.

To this plea the plaintiff demurred, For that the condition being to do something to a stranger, the defendant at his peril ought to perform it (*a*): like the case where the action of debt was brought upon a bond conditioned, that the defendant should give

(*a*) See the Year Books 33. *Hen.* 6. pl. 13. and 4. *Hen.* 7. pl. 4.

such

ſuch a releaſe as the judge of the prerogative court ſhould think fit; the defendant pleaded that the judge did not appoint any releaſe; and it was adjudged no good plea, becauſe the obligation is on his part, and he ought to tender a releaſe to the judge, *Cro. Eliz.* 716. STAPLES *against* ALDEN.

But *on the other ſide* it was ſaid, that a delivery to the ſervant is a delivery to the maſter himſelf; and if parcels of goods are delivered to the porter and loſt, an action lies againſt the maſter.

* THE COURT (*abſente* NORTH, *Chief Juſtice*), held the plea * [310] to be good, and that ſuch a conſtruction was to be made as was according to the intent of the parties, and that a delivery to the man was a delivery to the maſter.

Whereupon judgment was given for the defendant.

TRINITY TERM,

The Thirtieth of Charles the Second,

IN

The King's Bench.

Sir Richard Rainsford, *Knt. Chief Justice.*
Sir Thomas Twisden, *Knt.*
Sir William Wylde, *Knt.* } *Justices.*
Sir Thomas Jones, *Knt.*
Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Gillmore *against* Executor of Shooter. Case 109.

An act of parliament cannot have a retrospective operation; and therefore the 29. Car. 2. c. 3. which makes certain agreements void unless they are reduced into writing, was held not to extend to a parol agreement made previous to the commencement of the act.

S. C. 1. Freem. 466.

INDEBITATUS ASSUMPSIT.—There was a treaty of marriage between the plaintiff, who was of kin to the testator, and the daughter of one *Harris*, with whom he afterwards had two thousand pounds as the marriage portion; and *Mr. Shooter* in his life-time promised to give the plaintiff as much, or to leave him worth so much by his will. This promise was made before the 24th day of *June*, before this action brought. The marriage took effect. *Harris* paid the two thousand pounds, and *Shooter* died in *September* following, having made no payment of the money, or any provision for the plaintiff by his will. This action was commenced after *Shooter's* death, and upon the trial a special verdict was found upon the statute of Frauds and Perjuries, 29. *Car.* 2. c. 3. which enacts, "That from and after the 24th day of *June* "in the year 1677, no action shall be brought to charge any per- "son upon any agreement made in consideration of marriage, &c. "unless such agreement be in writing, &c.;" and that this was a bare promise without writing.

S. C. 2. Lev. 227. S. C. 2. Jones, 208. S. C. 1. Vent. 330. S. C. 2. Show. 16. 1. Com. Dig. 146. 1. Bac. Ab. 75. 4. Burr. 2461.

And

Gillmore against Executor of Shooter.

And by WYLDE and JONES, *Justices* (*absente* TWISDEN), judgment was given for the plaintiff; for it could not be presumed that the act had a retrospect to take away an action to which the plaintiff was then intituled; for if a will had been made before the 24th day of *June*, and the testator had died afterwards, yet the will had been good, though it had not been in pursuance of the statute.

TRINITY TERM,

The Thirtieth of Charles the Second,

I N

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*

Sir Hugh Wyndham, *Knt.* }
Sir Robert Atkins, *Knt.* } *Justices.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

*[311]

* After *against* Mazeen. Case 190.

COVENANT.—The plaintiff declared upon an indenture in which the defendant had covenanted that he was seised in fee, &c. and would free the premises from all incumbrances, in which there was also another covenant for quiet enjoyment; and the breach assigned was upon an entry and eviction by another, and concludes *et sic conventionem suam prædictam fregit*, in the singular number.

In covenant, if the breach assigned relate to three covenants, and the declaration concludes *et sic fregit conventionem*, yet it is good.

MAYNARD, *Serjeant*, upon a demurrer to the declaration said, that the breach related to all the three covenants, and therefore the conclusion was ill, because he did not shew what covenant in particular; and if he should obtain a judgment upon such a declaration, the recovery could not be pleaded *in bar* to another action brought upon one of the other covenants.

S. C. 2. Danv. 243. Ante, 229. Hard. 178. Cro. Jac. 298

But CONYERS *for the plaintiff* said, that "*conventio*" is *nomen collectivum*, and if twenty breaches had been assigned, he still counts *de placito quod teneat ei conventionem inter eos fact.*

And of that opinion was THE COURT; and that, the breach being of all three covenants, the recovery in one would be a good bar in any action afterwards to be brought upon either of those covenants.

See 8. & 9. *Will.* 3. c. 11.

Farrington

Case 191. Farrington *against* Lee.

Limitation of person. l actions only extends to account between merchants.

S. C. 1. Mod. 268. Ante, 213. Plow. 54. Cases T. T. 63. 9. Mod. 32. 12. Mod. 579. 2. Vern. 235. Abr. Eq. 303. Prec. Ch. 385. 398. 540. 604.

INDEBITATUS ASSUMPSIT, for money had and received to the use of the plaintiff; a *quantum meruit* for wares sold; and an *insimul computasset*, &c. The defendant pleads the statute of Limitations, "*non assumpsit infra sex annos.*" The plaintiff replies, that this action was grounded on the trade of merchants, and brought against the defendant as his factor, &c. The defendant rejoins, that this was not an *action of account*.

The plaintiff demurred, For that this statute 21. *Jac.* 1. c. 16. was made in restraint of the common law, and therefore is not to be favoured or extended by equity, but to be taken strictly; and that if a man hath a double remedy, he may take which he pleases; and here the plaintiff might have brought an action of account, or an action on the case grounded on an account.

* [312]

2. Peer. Wms. 145. 374. 3. Peer. Wms. 143. 287. 309. Stra. 836. Ld. Ray. 2 153. 883. 1099. 1101. 5. Com. Dig. "Temps" (G 6.). 3. Bac. Abr. 514. Jones, 401. Chan. Cas. 152. 1. Show. 341. 4. Mod. 105. 2. Vezey, 400. Mod. Rep. 71. 2. Ld. Ray. 838. Burr. 1281.

* But BALDWYN, *Serjeant*, insisted that the declaration was not full enough, for the plaintiff ought to set forth, that the action did concern *merchants accounts*, and that the replication did not help it.

THE COURT were of another opinion; for that it need not be so set forth in the declaration, because he could not tell what the defendant would plead, so that supposing him to be within the saving of the act his replication is good; and it is the usual way of pleading, and no *departure*, because the plea of the defendant gives him occasion thus to reply. But the saving extends only to accounts between merchants their factors and servants; and an action on the case will not lie against a bailiff or factor, where allowances and deductions are to be made, unless the account be adjusted and stated, as it was resolved in *Sir Paul Neal's Case* against his Bailiff. Where *the account* is once *stated*, as it was here, the plaintiff must bring his action within six years *(a)*; but if it be adjusted and a following account is added, in such case the plaintiff shall not be barred by the statute, because it is a *running account (b)*; but if he should not be barred here, then the exception would extend to all actions between merchants and their factors, as well as to actions of account *(c)*; which was never intended; and therefore this plea is good, and the saving extends only to actions of account.

Whereupon judgment was given for the defendant.

(a) See Webber *v.* Tivel, 1. Lev. 287. 2. Saund. 124. 2. Keb. 622. 634. 1. Vent. 89.; and Cheveley *v.* Bond, 4. Mod. 105. Holt, 427. Carth. 226. 1. Show. 341.

(b) See Martin *v.* Delboe, 1. Mod. 71. 1. Lev. 298. 1. Sid. 465.

(c) See Sherman *v.* Withers, 1 Chan. Cases. 152.

TRINITY TERM,

The Thirtieth of Charles the Second,

IN

The King's Bench.

Sir Richard Rainsford, *Knt. Chief Justice.*

Sir Thomas Twisden, *Knt.*
Sir William Wylde, *Knt.*
Sir Thomas Jones, *Knt.*
} *Justices.*

Sir William Jones, *Knt. Attorney General.*

Sir Francis Winnington, *Knt. Solicitor General.*

Astry *against* Ballard.

Case 192.

Bail are not discharged by *two* out of *six* principal being taken in execution before the *scire facias* sued out; but if the other *four* surrender before the return of the second *scire facias*, the bail shall be discharged.

THE DEFENDANT became bail for six persons; against whom the plaintiff got a judgment; and two were put in execution. The plaintiff afterwards brought *a scire facias* against the bail, who pleaded, that two of the principals were taken in execution before the *scire facias* brought.

The question was, Whether the bail was not thereby discharged?

IT WAS AGREED, that if five had surrendered themselves after judgment, yet the bail had been liable; but not so if the plaintiff (as in this case) have once made his election by suing out execution against the principals, and thereupon two are taken and in custody. Before the return of the second *scire facias* they have liberty, by the law, to bring in the principals; but the plaintiff, having taken out execution, hath made it * now impossible for the bail to bring them in to render themselves.

* [313]

S. C. 1. Vent. 315. S. C. 2. Lev. 195. S. C. 2. Jones, 75. S. C. 3. Keb. 761. 765. S. C. 1. Danv. 676. S. C. 3. Danv. 375. 1. Roll. Cro. Jac. 320. Comyns, 554. 8. Mod. 31. 188. 194. 10. Mod. 44. 267. 303. 11. Mod. 59. 12. Mod. 99. 112. 236. 310. 351. 423. 525. 559. 567. 583. 601. 1. Barnes, 47. 52. 56. 74. 83. 2. Barnes, 56. 91. 2. Peer. Wms. 542 Stra. 197. 419. 444. 643. 781. 872. 915. 922. 1217 Ld. Ray. 156. 1097. 1177. 1452. 146 1. Bac. Abr. 219. 4. Bac. Abr 421.

ASTRY *against* BALLARD.

But SYMPSON argued, that the bail was not discharged; for he ought to bring in the other four, or else he hath not performed his recognizance.

Sid. 107.

And so it was adjudged by THE COURT; for the law expects a complete satisfaction: The like resolution was in this court in the case of *Orlibear v. Norris*.

TRINITY

TRINITY TERM,

The Thirtieth of Charles the Second,

IN

The Common Pleas.

Sir Francis North, *Knt. Chief Justice.*
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Sir Francis Winnington, *Knt. Solicitor General.*

Strode *against* Perryer. Case 193.

A SPECIAL VERDICT IN EJECTMENT.—The case was this: *Robert Perryer*, being seised in fee of the lands in question, had issue two sons, *William* his eldest, and *Robert* his youngest son; and, being so seised, he devises these lands to his youngest son *Robert*, and his heirs. *Robert* the devisee dies in the life-time of his father, and leaves issue a son named *Robert*, who had a legacy devised to him by the same will. The grandfather afterwards annexed a codicil to his will (which was agreed to be a republication), and then he expressly publishes the will *de novo*, and declared that his grandson *Robert* should have the land as his son *Robert* should have enjoyed it had he lived.

A. having a son and a grandson, both of the name of *Robert*, devises land to his SON *Robert* and his heirs, and gives a legacy to his GRANDSON *Robert*. *Robert* the son dies in the life-time of the testator, who afterwards annexed a codicil to his will, and publishes his will *de novo*, declaring that his *grandson* shall have the land as his *son* would have enjoyed it had he lived. THE GRANDSON cannot take the lands thus devised; for by the death of THE SON the devise was *void*, and therefore could not be revived to the *grandson* by the *parol declaration*.—S. C. 1. Mod. 267. S. C. 1. Trem. 292. 477. S. C. 1. Eq. Abr. 407. S. C. 2. Lev. 243. S. C. Pollex. 545. S. C. Ray. 408. S. C. 1. Vent. 341. S. C. Jones, 135. S. C. 3. Keb. 845. S. C. 2. Show. 63.—Moor, 353. 404. Cro. Eliz. 422. Abr. Eq. 215. 406. Comyns, 381. 451. 531. 8. Mod. 221. 9. Mod. 7. 9. 68. 159. 10. Mod. 96. 371. 421. 520. 526. 11. Mod. 111. 148. Gilb. Eq. Rep. 4. 11. Fitzg. 225. 246. 314. Prec. Chan. 447. 1. Vern. 23. 30. 35. 97. 2. Vern. 106. 441. 593. 624. 598. 653. 722. 2. Peer. Wms. 136. 332. 347. 383. 529. (624). 3. Peer. Wms. 51. 354. Stra. 25. 445. Ld. Ray. 438. 1282 1326. 3. Com. Dig. "Devise" (E. 5.). (N. 25.). Cowp. 87. 840. 812. 1. Bro. Chan. Cas. 296. Dougl. 31. Powel on Devises, 676. 678. Gilbert on Devises, 90. 4. Term. Rep. 601.

STRODE *against* PERRYER.

The question was, Whether the grandson, or the heir at law, had the better title?

PEMBERTON and MAYNARD, *Serjeants*, argued for the title of the plaintiff (who was heir at law), that if a devise be to *S.* and his heirs, if *S.* die, living the devisor, the heir shall take nothing, because no estate vested in his ancestor *(a)*; so if a devise be to the heirs of *S.* after his decease, the heir shall take by purchase, for he cannot take as heir for the reason aforesaid. By the death of *Robert* the son, the devise to him and his heirs was void, and the annexing a codicil and republication of the will, cannot make that good which was void before: if it cannot make it good, then the heir cannot take by purchase; and by descent he cannot take, for his ancestor had no estate, and therefore he shall have none. Besides, this is not a good will within the statute, which requires
[314] it to be in writing: now the devise by the written * will was to the son, and the republication to the grandson was by words and not in writing; so that if he cannot take by the words of the will, he is remediless; and he cannot take as heir, because his ancestor died in the life-time of the testator, *Moor* 353. *Cro. Eliz.* 243.

SKIPWITH and BARREL, *Serjeants*, *on the other side*, That the new publication makes it good; for it makes a new will in writing, and it shall take according to the publication which makes it have the effect of a new will. It is true, *deeds* shall not be extended farther than the intent and meaning of the parties at the time of the delivery, but *wills* are to be expounded by another rule; therefore, though by the death of the son the will was void, yet by the republication it hath a new life, 1. *Roll. Abr.* 618. 5. *Co.* 68. 8. *Co.* 125.

THE CHIEF JUSTICE, WYNDHAM and ATKINS, *Justices*, were of opinion for the grandson against the heir at law, *viz.* That the republication made it a new will, and the *grandson* should take by the name of *son*: and ATKINS, *Justice*, relied on the case of *Brett v. Rigden* in the *Commentaries* *(b)*, where new purchased lands passed by a republication.

But A WRIT OF ERROR being brought, upon this judgment, in the king's bench, it was reversed *(c)*.

(a) Fuller *v.* Fuller, Cro. Eliz. 423. Hodgson *v.* Ambrose, Dougl. 337. Warner *v.* White, Dougl. 334. 1. Brown's Cases in Chan. 219. *notis*; and Doe, on the demise of Turner and his Wife, *v.* Kett, 4. Term Rep 601.

(b) Plowd. in the second Resolution of the Court, 345. See also, Goodright *v.* Wright, 1. Str. 25. 1. Peer Wms. 397.

(c) See S. C. Show. 66. S. C. 1. Vent. 342. S. C. Pollexfen, 552. S. C. 2. Jones. 135. 1. Eq. Abr. 407. note (a). 1. Mod. 268.; and Powel on Devises, 676. 678. for the reasons on which the judgment was reversed.

TRINITY TERM,

The Thirty-Fourth of Charles the Second,

IN

The King's Bench.

Sir Richard Rainsford, *Knt. Chief Justice.*
Sir Thomas Twisden, *Knt.*
Sir Thomas Jones, *Knt.* } *Justices.*

Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Anonymous.

Case 194.

MR. SAUNDERS moved for *a prohibition* to the spiritual court in the case of the children of one *Collet* and *Mary* his wife, to stay proceedings there upon a libel against them, that the said *Collet* had married *Anne*, the sister of the said *Mary*. They both appear and confess the matter, upon which a sentence of divorce was to pass; whereas in truth *Collet* was never married to *Anne*, but it was a contrivance between him and his wife to get themselves divorced, and the marriage declared void *ab initio*, to defeat their children of an estate settled upon them in marriage, with remainders over, by bastardizing them after they had been married and lived together sixteen years.

Prohibition lies on a libel, collusively brought in the spiritual court, to dissolve a marriage on the ground of *incest*, with a view to bastardize the issue.

2. Jones, 213. 259. Gilb. Eq. Rep. 156. 12. Mod. 35. 419. 432. 610. Stra. 53.

The reason why a prohibition was prayed was, Because "marriage or no marriage" was to be tried *in pais*, for that the inheritance and freehold of land were concerned in this case.

* THE COURT directed that they should *suggest* this matter, and that it was a contrivance to obtain a sentence of divorce to defeat them of their estate entailed on them, and then to move for a prohibition.

* [315]

1. Mod. 22. 2. Inst. 614. 3. Mod. 164.

Case 195. Smallwood *against* Brickhouse.

The spiritual court is to judge whether a person is capable of making a will; and therefore shall not be prohibited, although they grant probate of a will made by an infant under seventeen years of age.

THE SUGGESTION was, That *B.* being under the age of *sixteen years*, had made a will, and that the prerogative court proceeded to the proof of it; whereas, by the common law, a person is not capable till *seventeen years*; and therefore a prohibition was prayed.

And that the common law hath determined the time my *Lord Coke's Commentary upon Littleton* was cited, *Co. Lit.* 89. b. where it is said, That at eighteen years of age he may make his testament and constitute executors; and the age of a person is triable also *in pais*.

S. C. 2. Jones, 210
S. C. Show. 254.
1. Sid. 162.
2. And. 12.
Co. Lit. 89.
Godolph. 276
Abr. Eq. 17.
283. 1. Vern. 255. 328. 461 2. Vern. 8. 49. 76. 469. Prec. Chan. 316. Gilb. Eq. Rep. 74. 203. 209. Fitzg. 1. 110. 125. 164. 176. Stra. 73. 481. 666. 703. 847. 857. 961. 3. Bac. Abr. 119.

BUT THE COURT said, that the proof of wills and the validity of them doth belong to the ecclesiastical court; and if they adjudge a person capable, the Court will not intermeddle, for it is within their jurisdiction to adjudge when a person is of age to make a will; and sometimes they allow wills made by persons of fourteen years of age, and the common law hath appointed no time; it depends wholly on the spiritual law: And therefore a prohibition was denied.

Case 196. Joan Bailey's Case.

Administration committed to the debtor in execution does not extinguish the debt.

12. Mod. 9 205.

NOTE. One *Joan Bailey* being in execution, the plaintiff died intestate, and the right of administration came to her. And a motion was made for a *habeas corpus* to bring her from the compter into this court, for that having administered to her creditor she might be discharged.—BUT it was denied, for she could not be thus discharged, because *non constat de personâ*; neither can she give a warrant of attorney to acknowledge satisfaction. Therefore let her renounce the administration and get it granted to another, and then she may be discharged by a letter of attorney from such administrator.

*[316]

Case 197. Anonymous.

The Court will not grant a *mandamus* to admit, unless the nature of the office be stated.

4. Com. Dig. 109.
B. R. H. 99.
3. Bac. Abr. 530.

MANDAMUS to swear one who was elected to be one of the eight men of *Ashburn Court*.—IT WAS DENIED, because it is uncertain; for it ought specially to be inserted what *the office* is, and what is the place of one of the eight men of *Ashburn Court*, that it may appear to the Court to be such a place for which *a mandamus* doth lie; and though such a writ hath been granted for one of the approved men of *Guildford (a)*, yet it was specially set forth what his office was.

(a) 1. Lev. 162. Raym. 152.

EASTER

EASTER TERM,

The Thirty-Fourth of Charles the Second,

IN

The King's Bench.

Sir Francis Pemberton, *Knt. Chief Justice.*
Sir Thomas Jones, *Knt.*
Sir William Dolben, *Knt.* } *Justices.*
Sir Thomas Raymond, *Knt.*
Sir William Jones, *Knt. Attorney General.*
Sir Francis Winnington, *Knt. Solicitor General.*

Birch *against* Lingen. Case 198.

JUDGMENT was obtained upon a bond twenty-five years since, and in one of the *continuances*, from one Term to another, there was *a blank*. The executors of the defendant now brought a writ of error; and the plaintiff in the action got a rule to amend and insert the continuance, suggesting to the Court, that it was a judgment of a few Terms, and so aided by the statute of 16. & 17. *Car.* 2. c. 8. Upon this rule the plaintiff fills up *the blank*, and the record was certified so filled up into the exchequer-chamber.

Discontinuance, where amendable.
S. C. Skin. 46.
Moor, 710.
Cro. Eliz. 320. 489. 553. 619.
Stiles, 339.
2. Saund. 289.
12. Mod. 8. 684.
Stra. 139. 734. 947.
1. Com. Dig. "Amendment" (I.).
1. Bac. Abr. 89. 98. 108.

MR. POLLEXFEN, *for the defendant*, moved, that the record might stand as it did at first, and that the rule was got by a trick, and on a false suggestion, it being a judgment before the restoration of this king, and a discontinuance not amendable, for it is the act of the Court; and for an authority in the point the case of *Friend v. Baker (a)* was cited, where, after a record certified, a motion was made to amend it, because day was given over to the parties from *Easter* to *Michaelmas-Term*, and so *Trinity-Term* left out, where by the opinion of ROLL, *Chief Justice*, that the giving of a day more than is necessary is no discontinuance; but where a day is wanting, it is otherwise.

(a) Stiles, 339. 2. Danv. Abr. 151.

BIRCH *against* LINGEN.

But SANDERS, *for the plaintiff*, said, that this was only *a misprision* of the clerk, and no *discontinuance*, but amendable: the clerks commonly leave blanks in the *venires*, and if they neglect to fill them up, it is only a misprision and amendable by the Court; and the record being now filled up by the rule of the Court, ought not to be razed to make an error.

[317] * THE CHIEF JUSTICE was of opinion, That this was not *a discontinuance*, but an *insufficient continuance*, and an omission of the clerk only, who if he had filled up this blank himself without rule, it could not afterwards be set aside.

But JONES, *Justice*, was of another opinion, That it was such a misprision of the clerk as was not amendable by the statute of 8. *Hen.* 6. c. 12. since it was not the same Term, and all the proceedings being in the breast of the Court only during the Term, it ought not to be altered, but left in blank as it was; for where judgment is entered for the plaintiff, the Court may, upon just cause, alter it the same Term for the defendant, but not of another Term, the whole Term being but one day in law: and though the writ of error be returned into the exchequer, that will make no alteration, for the *record* itself remains still here, and it is only *a transcript* that is removed thither.—*Sed adjournatur* (*a*).

Cowp. 843.

(*a*) It was holden by the greater opinion, that this was not amendable by the clerk without the order of THE COURT; but if done by him according to law, they could not alter it, but they could punish him. S. C. Skin. 46.

Case 199.

Warren *against* Arthur.

If a lease be made, with exception of the trees, and a power reserv to the lessor to enter and cut them down, he may assign this power to another person; but if it be not properly pursued, the lessee may maintain trespass, both against the *lessor* and his *assignee*.

TRESPASS FOR BREAKING OF HIS CLOSE.—The defendants plead, that the place WHERE were, &c. the lands of one *Martin*, who made a lease thereof to the plaintiff, and did thereby except the trees growing on the same; in which lease the plaintiff did covenant with the said *Martin*, his heirs and assigns, that he and they from time to time, during the said lease, should have liberty and full power to fell the said trees, and root them up, repairing the hedges where they did grow; that the said *Martin* granted some of the trees to the defendant, by virtue whereof he and the rest of his servants did cut them down, which is the same breaking of the close of which the plaintiff complains.

To which plea MR. POLLEXFEN demurred for the insufficiency, because the defendant did not shew that, upon cutting down the trees, he did repair the hedges, as by the agreement ought to have been done; for this, being a limited and qualified power, ought to be set forth at large; and that it was a power only annexed to the reversion, and not assignable to any one else, and so the defendant hath wholly failed in his plea: he might have justified under *Martin*, but not in any of their own rights.

T. Jones, 205. Abr. Eq. 241. 1. Vern. 85. 355. 2. Vern. 376. 52. 542. 665. 8. Mod. 249. 381. 9. Mod. 11. 106. 10. Mod. 31. 72. 466. 12. Mod. 147. 151. Prec. Chan. 22. 6. 293. 452. 474. Cases Temp. Talb. 72. 93. Gilb. Eq. Rep. 137. 166. Fitzg. 156. 14. 2. Peer. Wms. (608). Stra. 596. 601. 662. 992. Ld. Ray. 660. 3. Salk. 276. 1. Salk. 240. 4. Com. Dig. "Poiar" (A. 1.).

But

* But THE COURT were of opinion, That an action doth lie in this case, both against the lessor and his assignee acting under his power. They agreed that a bare power is not assignable; but where it is coupled with an interest, it may be assigned; and here was an interest annexed to the power; for the lessor might sever the trees from the reversion. WARREN *against* ARTHUR.

Whereupon judgment was given for the defendant.

Scoble *against* Skelton. Case 200.

A prescription can only be annexed to an estate in fee, and therefore, in pleading, it must be expresly alledged that the party was seised in fee.

THE PLAINTIFF declared, That he was seised of a tenement called *East*, and the defendant of another tenement called *West Travallock*; and that he and all those whose estate he had, did use to fetch *pot-water* from the defendant's close, &c. Issue was taken upon this prescription, and a verdict for the plaintiff.

MR. POLLEXFEN moved in arrest of judgment, That the declaration did set forth generally that he was *seised*, but it did not appear it was *in fee*; for if it be for life only, then the action doth not lie, because a prescription cannot be annexed to an estate for life.

TREMAIN insisted, that the declaration was sufficient, and certain enough; for when the plaintiff doth alledge that he was seised generally, it shall be intended *a seisin in fee*; especially after verdict.

But THE COURT held the declaration to be defective in substance, because a prescription cannot be annexed to any thing but an estate in fee, and therefore it is not helped after verdict.—The judgment was reversed.

S. C. Skin. 36. S. C. 2. Show. 195. 10. Co. 59. 3. Mod. 50. 4. Mod. 241. 10. Mod. 158. 229. 6. Mod. 19. Stra. 909. 1224. 1228. 1. Salk. 335. 365. 5. Co. Dig. 38. Cowp. 47.

Putt *against* Roster. Case 201.

A recovery in trespass is a good plea in bar to an action of trover for the same taking.

TRESPASS FOR TAKING OF HIS CATTLE.—The defendant justifies for a heriot; and, upon a demurrer, had judgment. The plaintiff afterwards brought an action of trover and conversion for the same cattle; the defendant pleaded the former judgment in trespass in bar to this action of trover; and the plaintiff demurred.

* MAYNARD, *Serjeant*, argued, That the plea was not good, because *trespass* and *trover* are distinct actions, and one may be where the other is not; as if an infant give goods to one, an action of *trover* doth lie to recover them, but *trespass* will not: so if goods be delivered to another, and he refuse to deliver them upon demand, *trover*, but not *trespass*, will lie; and therefore, these being different actions, a recovery in one shall be no bar to

S. C. 3. Mod. 1. S. C. Raym. 472. S. C. Pollexf. 634. S. C. Skin. 48, 57. S. C. 2. Show. 211.

Ante, 42. 294. 4. Co. 39. 5. Co. 53. 6. Co. 37. Co. Ent. 38. Cro Eliz. 667. Cro. Jac. 15. 1. Leon. 313. 3. Leon. 194. 3. Lev. 124. 11. Mod. 68. 71. 181. 198. 219. Stra. 128. Ld. Ray. 1217. 1. Salk. 10 3. Burr. 1423. 1. Com. Dig. 112. 4. Bac. Abr. 117. 2. Vent. 169. 2. Bl. Rep. 7 9. 831.

Putt against Rotter. the other. A *formedon* brought in *the descender*, and judgment thereon, is not pleadable in bar to a *formedon* in *the remainder*. There is a great difference between a bar to *the action* and to *the right*; as where an administrator sued, not knowing that he was made executor, and judgment against him; and he afterwards proved the will, and brought an action as executor; the former judgment had against him as administrator shall not be a bar to this new action, because it is not a bar to the right, for by misconceiving his action the former abated.

Mr. Holt argued, That these were actions of the same nature, and therefore a judgment in one was a good plea in bar to the other. Trespass or trover lies for taking or carrying away the goods of another, and when he hath made his election which to bring, a recovery there shall be a perpetual bar to the other. In an appeal of *mayhem*, the defendant pleaded a former recovery in an action of assault and battery, and held good; though one is of a higher nature than the other.

Curia. The Court were of opinion, That an action of *trover* doth lie where a *trespass* doth not, and if the plaintiff hath mistaken his action, that shall be no bar to him. As to the case put of the *mayhem*, that doth not agree with this, because there can be no *mayhem* without an assault, but there may be *a trover* without a *trespass*; and though the appeal of *mayhem* be of a higher nature than the assault, because it doth suppose *quòd felonicè mayhemiavit*, yet the plaintiff can only recover damages in both. If a man bring trespass for the taking of a horse, and is barred in that action, yet if he can get the horse in his possession, the defendant in the trespass can have no remedy, because, notwithstanding such recovery, the property is still in the plaintiff. The defendant in this case hath justified the taking of the cattle for *a heriot*, and by the demurrer the justification is * confessed to be true in fact. Now by the taking for a *heriot*, the property of the goods was altered; and wherever the property is determined in *trespass*, an action of *trover* will never lie for the same. But it is a good plea in bar.

5. Co. 32. Cro. Jac. 15. 6. Co. 8. 2. Lev. 210. 2. Bl. Com. 390.

* [320]

And so it was adjudged here (*a*).

(*a*) It is said, that the report of this case in this book is apparently wrong. 2. Bl. Rep. 779.; and see the note at the end of the same case, 3. Mod. 2.

Case 202. James *against* Trollop.

Ancient grants of franchises and liberties must be allowed in *eyre*, or they cannot be pleaded; but a private grant, though made beyond the time of legal memory, may be pleaded, though not allowed, as a grant of a manor from a prior in the reign of Henry the First.—S. C. Pollexf. 623. S. C. Skin. 51. 239. S. C. 2. Show. 439. Abr. Eq. 367. Gilb. Eq. Rep. 225. 229. 5. Bac. Abr. 86. Gilb. Evid. 100.

Error of a judgment in the Common Pleas in an action upon a prohibition, where the plaintiff did suggest, That *William* late Prior of *Norbury* in *Staffordshire* was seised of the said manor and of the tithes thereof *simul et semel*, as of a portion of tithes, &c.; that the said Prior, in the twenty-

fifth

fifth year of *Henry the First*, granted the said manor and tithes to *William Fitzherbert* and his heirs, rendering rent; that the said *Fitzherbert* did enter and was seised, and held it discharged of tithes; that his heirs afterwards granted two hides of land, part of the said manor, to *S.* with the tithes, at five shillings rent; and so draws down a title by descent for three hundred years to *F.* who being seised devised the same to *Dorothy James* (under whom the plaintiff in the prohibition claimed); and then concludes, That *Fitzherbert* and all those whose estate, &c. did pay the said rent to the said PRIOR, which since the dissolution was paid to the king and his assigns, in discharge of all tithes, &c. The defendant, having craved *oyer* of the deed, demurred to the suggestion: and judgment was given for the plaintiff in the common pleas. *

And it was now said *for the plaintiff* in the errors, That it doth not appear by the pleadings whether the plaintiff in the prohibition would discharge himself by a prescription *in non decimando*, or *in modo decimandi*; for the grant from THE PRIOR being the foundation of his title, he could not thereby be discharged, because a deed before memory cannot be pleaded, unless it hath been allowed in a court of *eyre*, or some court of record since memory; and this deed being dated in the reign of king *Henry the First*, which was sixty-five years before the time of memory by the common law, that beginning in the reign of *Richard the First* (*a*), whatever is before that time cannot be tried by law. If it had been allowed *in eyre*, or in some of the courts of record, it may be pleaded, but no usage *in pais* can confirm it. *[321]

A declaration in prohibition, shewing a grant made in the reign of Henry the First, by A PRIOR who was seised of a manor, and of the tithes thereof *simul et semel*, as of a portion of the tithes of the said manor and tithes, paying to the said PRIOR *five shillings* a-year, and that the same *modus* was, after the dissolution of priories, paid to the king, &c.; and so pleading a prescription *modus decimandi* in discharge of tithes, is good.—Jones, 369. 2. Co 49. Cro. Eliz. 599. 1. Roll. Abr. 649. 654. Cro. Car. 423. Savil, 5. Skin. 239. 1. Vern. 85. 11. Mod. 46. 2. Peer. Wms. 573. Ld. Ray. 137. 677. 3. Com. Dig. 86. 5. Bac. Abr. 105.

* FIRST, But supposing the deed to be good, the plaintiff hath alledged a grant of a portion of tithes which he cannot have; for at the common law a layman was not capable of tithes *in prender*, for no one had capacity to take or receive them save only spiritual persons, for which reasons a layman could not prescribe *in non decimando*, but *in modo decimandi* he might, because there is still an annual recompence in satisfaction thereof (*b*).— SECONDLY, It is not alledged, that the place WHERE, &c. was parcel of the demesnes of the manor, therefore for what appears it might have been always in tendency; and though a prescription to a *modus* by the lord for himself and all his tenants is good, because it might have a lawful beginning, for the lands at first might be all in his hands before it was a manor, and so much paid for the tythes thereof, yet such a prescription by a tenant is not good.— THIRDLY, He hath alledged payment to THE PRIOR, and afterwards to the king, and so would infer *a modus*, to which he hath

(*a*) See 2. Bl. Com. 31. note (s).
(*b*) See Cro. Eliz. 511. Hob. 309. Cro. Jac. 308. 2. Bl. Com. 31.

not

JAMES *against* TROLLOP.

not positively prescribed, but by an old deed upon payment of five shillings to all those whose estates, &c.; and this will not do, for unless the *modus* doth go to the person who by law ought to have tythes, or unless it be for his benefit, it is not good; as where it was alledged that he ought to be discharged, because time out of memory he employed all the profits of the land for the repairs of the body of the church, and to find necessaries, &c. this was not a good *modus*, because it is no recompence for the parson.

But it was said by SAUNDERS, *for the plaintiff* in the prohibition, that by the suggestion there was a good title alledged to be discharged of tithes; for it is set forth that THE PRIOR had a portion of tithes, and the lands *simul et semel*, and being a corporation they might prescribe for tithes in *prender*; and the tithes being well in them, they may well grant it to *Fitzherbert*, paying five shillings; and constant payment being alledged ever since, it is a good title. As to the deed, it is true, that it is dated before the time of memory; but yet it is pleadable because it is a private deed, and so need not be allowed in eyre or in courts of record; for such as are not to be pleaded unless allowed there, are only grants of franchises and liberties from the king; but the confession of the deed to be beyond memory, and the constant payment of five shillings, is a sufficient title to the plaintiff if the deed is not pleadable; and if it is, then it is a good discharge that way.
*[322] * And as to the objection, that the *modus* is payable to a wrong person; there are many such which are not paid to the parson of the parish, but to laymen: but in this case it doth appear that there was a *modus* in THE PRIOR, which being received till it came to the crown, it is good, although now paid to others; so that for that reason the spiritual court ought to be prohibited.

And of that opinion was ALL THE COURT; for if a *modus* be payable to him who hath the right of the tithes, though it be not to the parson of the parish, it is well enough, especially where the plaintiff (as here) alledgeth it to be a *portio decimarum* belonging to the prior, so that it cannot be said that the parson hath not *quid pro quo*; for he had nothing at first. This composition was made with the prior, and the plaintiff is only to shew payment to him, and to those who have his right. And as to the date of the deed, it is pleadable though time out of memory, because it is a private deed; but grants of franchises and liberties must be allowed in eyre; and so is my *Lord Rolls* to be understood in his Abridgment.

Whereupon judgment was affirmed.

A TABLE

A

TABLE

OF THE

PRINCIPAL MATTERS,

CONTAINED IN THE

SECOND VOLUME.

A.

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2. A plea, though in the form of a plea in *abatement*, yet if, by the matter it necessarily discloses, it appear that the plaintiff hath no cause of action, it shall be taken *in bar*, *Stubbins v. Bird*, 63

3. A commoner may *abate* hedges or other fences made upon his common, *Mason v. Cæsar*, 66

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ACCOUNT.

1. If an open running account be once *stated*, and a balance struck, the creditor cannot recover upon a general *indebitatus assumpsit* only, but must insert an *insimul computâsset*, *Milward v. Ingram*, 44

2. *Sed quære*; For it has been held, that an *insimul computasset* is no plea in bar, to an action of *assumpsit*; for, though true, it does not extinguish the *original promise* on which the action is founded, *Rolls v. Barnes* (1. Bl. Rep. 65.), 44. *notis*

3. In

3. In an action of account against *a factor*, he shall not be allowed a sale upon *credit*, although the goods were *perishable*, without a special authority for that purpose; for a factor cannot, upon a general commission, sell the goods of his principal, except for *ready money*, *Anonymous*, 100

4. *Quære*, If a plea to account before auditors need be verified by oath, 101

5. In an action of account, if time be made parcel of the issue it is bad, *Brown v. Johnston*, 145

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ACQUITTAL.

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ACT.

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2. On a condition to grant an annuity within six months after the death of *A.* or, on his refusing so to do, to pay 300l. the *obligee* is bound to do the *first act*, viz. to make a *request* of a deed of annuity within the six months, *Basket v. Basket*, 200

3. If, by the *act of God*, or of the party, or through default of a stranger, it becomes impossible for the obligor to do one thing in *a disjunctive condition*, he is notwithstanding bound to do the other, *ibid.* 204

4. If *A.* covenant not to do *an act* without the consent of *B.* and *C.* each of the covenantees may maintain an action for his particular damage, *Wilkinson v. Sir Richard Lloyd*, 82

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1. An action misconceived cannot be pleaded in bar of another action brought by the same plaintiff against the same defendant for the same cause, *Rose v. Standen*, 294

2. In an action for a *false return* of a writ issued out of the king's bench to the chancellor of the dutchy of *Lancaster*, the *venue* may be laid either in *Middlesex* or in *Lancashire*, *Naylor v. Sharpless*, 23

3. An action on which a defendant has judgment for default of *venue*, or other defect in the declaration, cannot be pleaded *in bar* to another action for the same cause, *Rozal v. Lampen*, 42

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ACTION ON THE CASE.

1. If process be directed to the *six coroners* of the county-palatine of *Lancaster*, and delivered to *one* of them, and they all return *non est inventus*, when the *one* might have arrested the party, an action on the case for a *false return* will lie against the *six* jointly; for they all make but *one officer*, *Naylor v. Sharpless and Others, Coroners of Lancashire*, 24

2. If a defendant in custody upon *mesne process* tender a bail-bond, with sufficient sureties to *the bailiff*, and *he* refuses it, an action on the case will lie against *the sheriff*, *Smith v. Hall*, 32

3. An action on the case in the nature of *conspiracy* lies against one person only, for

for cauſing the plaintiff to be *falſely and maliciouſly* indicted, *per quod* he was put to great expence, although the plaintiff was *acquitted* of the *treſpaſs* laid to his charge, *Norris v. Palmer*, 51

4. So alſo an action on the caſe will lie for *a malicious arreſt*, where there is no *probable cauſe* of action, *ibid.* 52

5. And it is ſaid, that the *acquittal* on an *indictment* for a *common treſpaſs* ſhews the proſecution to have been *malicious*, becauſe the proſecutor might have brought a *civil action*, in which the defendant, on being found *not guilty*, would have been allowed *coſts*; and therefore an action on the caſe will lie on account of the expences to which he was put by the indictment, *Anonymous*, 306

6. But an action on the caſe will not lie againſt a ſheriff for returning *cepi corpus et paratum habeo*, although the party arreſted do not appear, *Page v. Tulſe*, 83

7. So an action on the caſe will not lie againſt the ſheriff, though he take inſufficient bail; but he ſhall be amerced if the defendants do not appear, *Ellis v. Yarborough*, 178

8. An action on the caſe lies againſt an *ex-ſheriff* for omitting to deliver to the *new ſheriff* a writ of *ſuperſedeas*, by reaſon of which omiſſion the plaintiff was taken in execution, *Calthrop v. Phillips*, 217

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3. In what manner the ſtatute of 2. Rich. 2. c. 5. may be recited in an action for words ſpoken of a peer of the realm, *Lord Shafiſbury v. Lord Digby*, 98

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ACT OF PARLIAMENT.

1. An act of parliament ordaining, that ſcavengers ſhall be choſen in *London* and *Weſtminſter*, and the liberties thereof, according to the ancient uſages thereof, and appointing a new form of election in *all other places*, deſtroys a cuſtom in the borough of *Southwark* to elect ſcavengers in a manner contrary to the directions of the act, *City of London v. Gatford*, 39

2. Wherever *a cuſtom* and the directions of an *affirmative ſtatute* are ſo inconſiſtent with each other that they cannot both ſtand together, the directions of the Legiſlature ſhall prevail, *ibid.* 41

3. The ſtatute 5. Edw. 6. c. 16. concerning the *ſale of offices*, does not extend to the ſale of the office of *ſecretary* to the governor of *Barbadoes*, *Daws v. Sir Paul Pindar*, 45

4. When the ſcope of an act of parliament appears to be general, the law looks to the meaning of the Legiſlature, and will conſtrue the words of it ſo as to extend it to particular caſes within the ſame reaſon, *Croſier v. Tomlinſon*, 71

5. Therefore, although in the ſtatute of Limitations, 21. Jac. 1. c. 16. *treſpaſs* only is mentioned; yet it is held, that actions of *aſſumpſit* are within it, *ibid.* 73

6. An act of parliament, although it concern only a particular deſcription of perſons, as the 13. Eliz. c. 10. reſpecting eccleſiaſtical perſons, is a general law, of which the Judges are bound to take notice without its being ſpecially pleaded, *Chapter of Southwell v. Biſhop of London*, 56

7. If a private act of parliament enact, that "all manors, meſſuages, lands, "tenements, poſſeſſions, reverſions, "remainders, rights, intereſts, &c. "and other things, *of what nature* "*ſoever*," ſhall be forfeited on an attainder of HIGH TREASON, lands in *fee tail* are forfeited; for they ſhall be included in the general words "other "things,

" things of what nature ſoever," *Brown v. Waite*, 130

8. The act of parliament 23. Hen. 6. c. 10. reſpecting ſheriffs bonds, is a public act, *Ellis v. Yarborough*, 178. *notis*

9. An act of parliament impoſing a duty on " every *fire-hearth* and ſtove in any " houſe," extends to *ſmiths forges*, although there is a proviſo exempting " any *blowing-houſe*, ſtamp, furnace, " or kiln," from the payment of the duty, *Bell v. Knight*, 182

10. An act of parliament impoſing a duty on " all houſes and edifices whatſo-" ever," includes new houſes unfiniſhed, and which have never been tenanted, *Ironmongers Company v. Naylor*, 186

11. An act of parliament cannot operate retroſpectively, and therefore when the 29. Car. 2. c. 3. enacts, that " from " and after 24 June 1677 no action " ſhall be brought upon any agreement " in conſideration of marriage, unleſs " ſuch agreement be in writing," a verbal promiſe made before the 24 June ſhall not be avoided by this act, *Gilmore v. Shooter*, 310

ADMINISTRATION.

1. By 31. Edw. 3. c. 11. it is accorded and aſſented, " That in caſe where a " man dieth inteſtate, the ordinaries " ſhall depute *the next* and moſt lawful " *friends* of the dead perſon inteſtate to " *adminiſter his goods*," 21

2. By 21. Hen. 8. c. 5. ſ. 3. " In caſe " any perſon die inteſtate, or that the " executors named in a will refuſe to " prove it, the ordinary ſhall grant " adminiſtration to *the widow* of the " perſon deceaſed, or to the *next of* " *his kin*, or *to both*, as by the diſcre-" tion of the ordinary ſhall be thought " good," 21

3. By 29. Car. 2. c. 3. " Huſbands may " demand and have *adminiſtration* of the " rights, credits, and other perſonal " eſtates of their *wives*, and enjoy " the ſame as they might have done " before the ſtatute of Diſtributions " 22. & 23. Car. 2. c. 10." 20. *notis*

4. And although adminiſtration is not granted to a huſband *de jure*, yet it is ſaid to have been agreed, that the huſband, as being the *beſt friend* of his wife, is intitled to adminiſtration, *Wilſon v. Drake*, 21

5. *Sed quære*, If a *feme ſole* have debts due by ſpecialty, and ſhe marries and dies, whether the huſband ſhall, by the above ſtatutes, have *adminiſtration*, or be compelled, by 22 & 23. Car. 2. c. 10. to make diſtribution to her kindred, *ibid.* 20

6. *Quære*, As a *feme covert* cannot by law make *a will*, whether ſhe can be ſaid to be a perſon dying *inteſtate* within the meaning of 21. Hen. 8. c. 5. 22

7. A declaration as adminiſtrator, ſtating that adminiſtration was granted to him by *the official* of the biſhop, is ſufficient, without alledging him to be *loci iſtius ordinarius*, for he ſhall be intended to have juriſdiction; but in the caſe of *a peculiar*, the particular authority to grant adminiſtration muſt be ſet forth, *Daws v. Harriſon*, 65

8. If a huſband die leaving his wife his executrix, and ſhe dies before probate granted to her, the adminiſtration of the huſband's effects muſt be granted to, and diſtribution made among, the next of kin of the huſband, and not to the next of kin to the wife, *Harris's Caſe*, 101

9. To debt on bond againſt an *adminiſtrator* the defendant may plead that he gave another bond *in his own name* in diſcharge of the firſt bond, *Peck v. Hill*, 137

10. To debt on bond againſt an *adminiſtrator*, if iſſue be joined whether he had *aſſets* on a particular day, it is an *immaterial iſſue*, *Read v. Dawſon*, 139

11. The ordinary cannot grant adminiſtration where there is an executor named in a will, *Abraham v. Cuningham*, 149

12. In ſuch caſe, therefore, if a ſtranger obtain *adminiſtration*, and thereby poſſeſs himſelf of the effects of the teſtator, and ſell a leaſe, ſuch ſale is void, although the executor afterwards renounces, *ibid.* 146

13. If

13. If a plaintiff has a debtor in execution, and, upon the death of the plaintiff, administration be granted to the debtor, yet the Court will not discharge such debtor from the execution; *Joan Baillie's Case*, 315

14. Where divers persons claiming administration as next of kin to an intestate are in equal degree, the ordinary may commit administration to which he pleases, *Smith v. Tracy*, 205

15. To debt on bond against an administrator, if the defendant plead a *judgment recovered* against the intestate, and no assets *ultra*; the plaintiff may reply, that an action was brought against the intestate, but that he died before judgment; and that the judgment afterwards obtained was kept on foot by fraud, *Randal's Case*, 308

See EXECUTOR.

ADVOWSON.

1. If a manor, formerly in the possession of *an abbot*, and to which manor an *advowson* was *appendant*, be granted by the Crown to *an archbishop* with an exception of the advowson, the appendancy is thereby destroyed, *Rex v. Bishop of Rochester*, 1

2. But if the archbishop reconvey the manor to THE KING, describing the advowson as *appendant*, a subsequent grant of "the said manor and advowson," describing it "to the said "archbishop formerly belonging, and "which was regranted to the king "by the said *archbishop*, and lately in "the possession of *the abbot*," to have and hold the same "*adeo plenè* as the "said *archbishop* OR *abbot* had it, or as "it was in our hands by any ways and "means whatsoever," will pass the *advowson*, *ibid.* 1

3 Before the statute *de prerogativâ regis*, if the king granted *a manor*, an *advowson* belonging to it passed, although it was not named in the grant, 2

4. If three persons, each claiming a sole right to an *advowson*, enter into an agreement by indenture to present *by turns*, they have no remedy against each other but upon the covenants of the indenture; but if an act of parliament is made confirming the agreement, and ordaining that they shall be *tenants in common*, an interest is vested in each till partition made, *Crossman v. Sir John Churchill*, 97

AGREEMENT.

1. Articles of agreement reciting an intended marriage, covenanting to settle a jointure in consideration of a marriage portion, and concluding thus, "And it is hereby *agreed*, that a fine "shall be levied to secure the payment "of the said portion," amount to *a covenant* to levy the fine; and the court of chancery may decree the execution of it *in specie*, *Hollis v. Carr*, 87

2. An agreement made between three persons, each claiming a sole right to an advowson, to present by turns, does not *vest* any interest in either of them, *Crossman v. Sir John Churchill*, 97

3. If *A.* enter into an *agreement* for himself, his executors, and assigns, to pay to *B.* his proportion of the money that lands shall sell for less than such a sum, so as *B.* give the said *A notice* in "writing of the sale of the said lands," this amounts to a covenant on which the *executor* of *A.* having notice of the sale, is liable to an action, although no notice was given to his testator, *Harwood v. Hilliard*, 268

4. By 29. Car. 2. c. 3. no agreement made in consideration of marriage is good, unless such agreement be in writing, &c. 310

ALIEN.

An *alien* subject of the States of *Holland*, falling into disgrace there, had his pension taken from him by public authority; he afterwards came into *England*, and contracted a great friendship with *Dr. Brown*; a war then broke out between *England* and *Holland*, and the *Hollanders* were by proclamation declared to be *alien enemies*; while this war continued, a devise was made to the alien "during "his exile from his own native coun-

"try, but if it please God to restore "him to his country or take him out of "this life, then to *A.* &c.;" a peace was afterwards concluded, and the intercourse between the two nations made lawful, but the *alien* was not sent over for by the States, and his former pension was given to another: and held to be a good devise while the alien continued in *England* unprovided for by the States of *Holland*, *Paget v. Vossius*, 224

AMENDMENT.

1. In a *qui tam* action for being at a conventicle, if the declaration state it to have been held at the mansion-house of *A.* when it was not at his mansion-house, the Court will not permit the plaintiff to amend his declaration after issue joined, *Sir William Turner's Case*, 145
2. There is no difference between *civil suits* and *penal actions* as to amendments at common law, *ibid.* 145. *notis*
3. And the Court will, under the circumstances of the case, permit amendments to be made even after issue joined, *ibid.* 145. *notis*
4. In an action of assault, battery, wounding, and false imprisonment, the plea "as to the wounding *not guilty*" was allowed to be inserted after the parties had joined in demurrer, *Anonymous*, 167
5. In what case a *discontinuance* is amendable, *Birch v. Lingen*, 316

AMERCIAMENT.

1. If a sheriff return *cepi corpus*, and have not the body on the return of the writ, he shall be amerced, *Page v. Tulse*, 84
2. Same point, *Ellis v. Yarborough* 178

ANCESTOR.

See HEIR—PLEADING—DEVISE.

APPENDANCY.

1. The appendancy of an advowson to a manor is destroyed by a grant of the manor with an exception of the advowson, *Rex v. Bishop of Rochester*, 1
2. If toll be appurtenant to a manor, the appurtenancy is not destroyed by the manor coming to the crown, *James v. Johnston*, 144

ARBITRATION.

See AWARD.

ARREST.

1. An action on the case will lie for a *malicious arrest*, where there is no *probable cause* of action, *Norris v. Palmer*, 52
2. To make an arrest in the *Palace-yard* not far distant from the gate of THE HALL, the Courts being then sitting, is a contempt of the Court, *Long's Case*, 181

ASSETS.

1. A reversion expectant by an *heir* on the determination of a lease for years by his *ancestor*, is assets by descent, *Osbaston v. Stanhope*, 50
2. Lands devised to an eldest son, provided he pay twenty pounds to the executrix toward the payment of the testator's debts, are not *assets* by *descent*; for wherever the heir takes by a will with *a charge*, he takes by *purchase*, *Brittam v. Charnock*, 286

ASSIGNEE.

1. If the lessor of a term receive the rent to him and his executors or to his assigns, whether the heir shall take, 93. *notis*
2. A devisee is not an assignee to take where rent is reserved to a man and his assigns, 93. *notis*
3. Debt will lie for rent reserved where a lessee for years *assigns* his whole term, but not where he *surrenders* the whole term to the original lessor, *Lloyd v. Langford*, 174
4. If a lease be made with an exception of the trees, and a power reserved to the lessor to enter and cut them down, he may assign this power to another person; but if it be not properly pursued,

sued, the lessee may maintain trespass both against the lessor and his assignee, *Warren v. Arthur,* 317

ASSIZE.

In an *assize* or *quòd permittat*, the defendant may plead in bar that the nusance is abated, 253

ASSUMPSIT.

1. In *assumpsit*, where there are mutual promises, the plaintiff must aver performance of his part of the agreement, for each has a remedy against the other, *Smith v. Shelbury,* 34

2. To *assumpsit* upon an *indebitatus* for fifty pounds, and a *quantum meruit*, the defendant may confess both, and plead, that after the promise and before the action there was an *account stated* between him and the plaintiff, *Milward v. Ingram,* 44

3. If there be an *assumpsit* to do a thing, and there is no breach of the promise, it may be discharged by *parol*; but if it be once broken, then it cannot be discharged without a release in *writing*, *ibid.* 44

4. If *A.* sell his horse to *B.* for ten pounds, and, there being other dealings between them, they come to an *account* upon *the whole*, and *B.* is found in arrear five pounds, *A.* must bring his *insimul computâsset*, for he can never recover upon an *indebitatus assumpsit*, *per* Nash, *C. J.* But see 1. Bl. Rep. 65. 44

5. The statute of limitation 21. Jac. 1. c. 16. extends to action of *indebitatus assumpsit*, *Crosier v. Tomlinson,* 71

6. If *A.* being a tradesman in *London*, marry the daughter of an alderman with four hundred pounds fortune, and the father-in-law, after the marriage, merrily say, that if his son-in-law would procure himself to be knighted, so that his daughter might be *a lady*, he would give him two thousand pounds, it being intended when the son-in-law should get by his trade an estate sufficient to intitle himself to knighthood, and the son shortly after procure himself to be knighted; *quære*, If an *assumpsit* will lie on this promise? *Sir Osbern Rands v. Tripp,* 200

7. In *assumpsit*, on a promise to save the plaintiff harmless in the *possession* of a house, in consideration of his paying so much a-year, an allegation that such a person sued him and recovered judgment is sufficient after verdict, although it is not stated that the disturber had title, *Major v. Grigg,* 213

8. On an *assumpsit* that the defendant, in consideration that the plaintiff at his request had exchanged horses with him, promised to pay him five pounds, with a breach alledged in non performance, the defendant cannot plead that the plaintiff, before any action brought, discharged him of his promise, *Edwards v. Weeks,* 259

9. If a man receive the profits of an office on pretence of title, the person who has a right to the profits may recover them by *assumpsit*, as for monies had and received to his use, *Anis v. Stakeley,* 262

ASSURANCE.

On a condition to pay money upon making such an assurance, a plea of payment is good without shewing when the assurance was made, 33

ATTACHMENT.

1. An attachment issues against a sheriff after rule and neglect to bring in the body of a debtor in his custody, *Ellis v. Yarborough,* 178

2. An attachment does not lie against a sheriff for neglecting to take a *replevin bond*, *Rex v. Lewis,* 181. *notis*

ATTORNEY.

1. At common law no attorney could be made in any action until Edward the First gave leave to his subjects to appoint them, and ordered the Judges to admit them, 83

2. An attorney, together with the officer, committed to THE FLEET for making an arrest in *Palace-yard* near to the gate of Westminster Hall while the Court was sitting, *Long's Case,* 181

3. An attorney arrested on an *attachment of privilege* shall be discharged on common bail, *Long's Case*, 181

AVERMENT.

In an information on the 4. & 5. Phil. & Mary, c. 8. which inflicts two years imprisonment on any person above the age of fourteen, who shall take away an heiress being within the age of sixteen years; a charge that the defendant *being* above fourteen, &c. is a sufficient averment that he *was* above that age, *Rex v. Moor*, 130

AVOIDANCE.

1. A lease of the next avoidance made by a chapter that hath no dean is void, *Chapter of Southwell v. Bishop of Lincoln*, 56

2. Where there is an agreement between three for a presentation by turns, a grant of the next avoidance by one, though the church is full, is good, *Crossman v. Churchill*, 97

AUDITA QUERELA.

1. If *A.* recover in trespass against *B.* a soldier, for taking his property by compulsion of his comrades, and take out execution thereon, and then a statute pardon all acts of hostility, and discharge the offenders from all actions and executions on that account, *B.* may by *audita querela* be relieved from the judgment and execution, *Benson v. Idle*, 37

2. If a plaintiff recover *satisfaction* in an action for the escape of one defendant, the other, on proceedings against him for the same debt, shall be relieved by *audita querela*, *Alford v. Tatnell*, 50

AUTHORITY.

1. If a deed be made to three, *habendum* to two for their lives, with remainder to the third for life, and there is a letter of attorney to make livery to two, and instead of doing that the attorney makes livery to all, *qu.* If this is a good execution of his authority? *Norris v. Trist*, 78

2. There is a difference between matter of interest and the execution of an authority, 79

3. If a letter of attorney be made to three jointly and severally, two cannot execute it, because they are not the parties delegated, *per* NORTH, *Chief Justice*, 79

AWARD.

1. If a bond be to perform an award of two persons, or either of them, it is not sufficient to plead that those two persons made "*no award*," without adding "*nec eorum aliquis*," *Bridges v. Beddingfield*, 27

2. If a submission to arbitration provide "that the award be in writing under "*hand* and *seal*," the pleading such award under *seal* only is bad, *Columbel v. Columbel*, 77

3. On a submission to arbitration *so that* the award be made on or before the first day of *December*, and if the arbitrators cannot agree to make the award within the time allowed to chuse an umpire, they may chuse an umpire after the first of *December*; for, as they made no award, their power was not determined, *Adams v. Adams*, 169

4. If an umpire, in making his award, recite, that the parties had bound themselves to stand to his award, when in fact they only bound themselves to stand to the award of the arbitrators, yet the award of the umpire is good, *Adams v. Adams*, 169

5. An award to pay two sums at future times, and that the party to whom they were ordered to be paid should give a release *presently*, is bad, *Adams v. Adams*, 170

6. But an award that the money shall be paid and release be given, is good, 170

7. If one of two partners sign an arbitration bond "for himself and partner," when the partner is no party to the arbitration, such partner is not bound to perform the award, *Strangford v. Green*, 228

8. On a submission to arbitration concerning partnership, an award that "all suits shall cease" shall be intended all suits concerning the partnership, *Strongford v. Green*, 228

9. An award shall only refer to matters between the plaintiff and defendant, *ibid.* 221

10. An award that "all suits shall cease" is mutual, and has the effect of *a release, ibid.* 228

11. If a man sign an arbitration bond "for himself *and partner*," a refusal by the partner to perform the award is a breach of the condition, though he is not party to the submission, *ibid.* 228

12. On a submission to arbitration respecting *seventy-two pounds* due for rent, an award that the party shall pay *fifty pounds* in full satisfaction of the *seventy-two pounds*, is good, *Godfrey v. Godfrey*, 303, 304

13. If two things be awarded, the one within and the other not within the submission, the latter is void, and the breach must be assigned only on the first, *Hill v. Thorn*, 309

14. If there be a submission of a particular difference, and there are other things in controversy, an award of general releases is bad, *ibid.* 309

15. If the submission be of all differences till the 10th day of *May*, and a release be awarded to be given of all differences till the 20th of *May*, if there are no differences between those days, the award is good, *Hill v. Thorn*, 309

B.

BAIL.

1. If a sheriff refuse a bail bond with sufficient sureties, it is an offence within the 23. Hen. 6. c. 10. and, as it is an oppression of the subject, it is also an offence at common law, *Smith v. Hall*, 32

2. The Court will not order *special bail* in an action on the statute 2. Rich. 2. c. 5. *Marquis of Dorchester's Case*, 216

3. The statute 23. Hen. 6. c. 10. relating to the form in which bail bonds shall be given to a sheriff, is a public act, 305

4. A bond given to a plaintiff by a third person, conditioned, that the person arrested shall give such security as the plaintiff shall approve, or render his body at the return of the writ, is not within the 26. Hen. 6. c. 10. *Hall v. Carter*, 305

5. An agreement in writing to put in good bail for a person arrested on *mesne process* at the return of the writ, or surrender the body, or pay debt and costs, made by a third person with the *bailiff* of the sheriff, in consideration of discharging the party arrested, is void, *Rogers v. Reeves*, 305 *notis*

6. But the undertaking of an attorney for the appearance of a defendant, is not void; because it is given to the plaintiff in the action, and not to the sheriff, *ibid* 305 *notis*

7. Bail are not discharged by *two* out of *six* principals being taken in execution before the *scire facias* sued out; but if the other *four* surrender before the return of the second *scire facias*, the bail shall be discharged, *Astry v. Ballard*, 313

BANKRUPTS.

The warrant of commissioners of bankrupts, to commit for refusing to be examined and sworn touching the discovery and disclosure of the bankrupt's estate, must aver that the party was summoned and refused to attend, *Penrice and Wynn's Case*, 307

BARGAIN AND SALE.

A bargain and sale, though no money is paid or rent reserved except that of *a pepper corn* to be paid at the end of six months, on demand, is a good deed to make a tenant to the *præcipe*; for the

the reservation of a pepper-corn is a sufficient consideration to raise a use, *Barker v. Keate*, 249

BARON AND FEME.

See HUSBAND *and* WIFE.

BAR.

1. If a plaintiff bring an *insimul computasset*, when in fact there was no *account stated*, the defendant cannot plead a recovery in this action *in bar* to an action of account for the same cause, *Rose v. Standen*, 295
2. If judgment be given for a defendant for a default of the *venue*, or other defect in the declaration, he cannot plead this "judgment recovered" in bar to another action for the same cause, *Rozal v. Lampen*, 42
3. If a plaintiff bring *trespass* where the question is only upon the *wrongful taking*, and not upon the *right of property*, a judgment for the defendant cannot be pleaded *in bar* to *trover* for the property, *Putt v. Royster*, 319
4. But wherever the *property* is determined in an action of *trespass*, an action of *trover* will not lie for the same goods, *Putt v. Royster*, 320

BOND.

1. To debt on bond against an *administrator*, the defendant may plead, that he gave another bond *in his own name* in discharge of the first bond, *Peck v. Hill*, 137
2. But one bond cannot be given by the same obligor in discharge of another, 137
3. A plea to debt on bond, that it was given as an indemnity to the plaintiff's testator against another bond, is bad, *Meare v. Meare*, 137 *marg.*
4. In debt on bond conditioned to make an assurance of an annuity within six months after the death of a third person, and if the obligor refuse, when thereto requested by the obligee, then to pay three hundred pounds; if the obligee neglect to make the request within the six months, the obligor is discharged from the condition of the bond, *Basset v. Basset*, 200
5. A bond conditioned to pay when such a bill of costs should be stated by two attornies, indifferently to be chosen between the parties, is forfeited by one of the parties refusing to appoint an arbitrator, *Otway v. Holdips*, 266
6. If a bond be conditioned to pay money when a ship should go from *A.* to *C.* and from thence to *Bristol*, and should arrive there, or at any other port of discharge in *England*; and the ship in going from *A.* to *C.* touch at *Bristol*, and take in provisions, but is not discharged there, and is cast away as she was proceeding in her voyage to *Cales*; the UNDERWRITER is not liable for this loss, *Dunning v. Lascomb*, 267
7. A bond given for a usurious contract, or for money won at play, is void, *Anonymous*, 279
8. A bond conditioned, that if the obligee shall pay twenty pounds, *viz.* five pounds on four several days therein mentioned, but if default shall be made in any of the payments, then the said obligation to be void, or otherwise to stand in full force, is good, *Wells v. Wright*, 285
9. A bond for payment of forty pounds, with a condition, "that if the obligee "should work out the said forty pounds "at the usual prices of packing, when "the obligor should have occasion "either for himself or his friends to "employ him, *or* otherwise if he should "pay the forty pounds, the bond to "be void;" being in the disjunctive, the obligor may elect to take the sum either in *work* or in *money*, *Wright v. Bull*, 304
10. A bond given to a plaintiff by a third person, conditioned, that the person arrested shall give such security as the plaintiff shall approve, or render his body at the return of the writ, is not within the statute 26. Hen. 6. c. 10. *Hall v. Carter*, 305

11. In

11. In debt on bond, conditioned, that the defendant should save *A.* harmless, and secure the mortgaged premises; a plea that *A.* was not damnified, for that the defendant had paid the principal and interest, is bad; for the *non damnification* goes only to the person and not to the premises, *Shaxton v. Shaxton*, 305

12. In debt on bond, conditioned, to deliver forty pair of shoes within a month, at *Holborn Bridge*, to *H. K.* a common carrier to *G.* for the use of the obligee; a plea, that in all that space of a month *H. K.* did not come to *London*, but that such a day, at *Holborn Bridge*, he delivered forty pair of shoes to *A. G.* the carrier's servant, is good, *Staples v. Alden*, 309

BREACH.

1. On a devise of lands to *A.* the heir, and of other lands to *B.* and if *A.* molest *B.* by suit or otherwise, *B.* shall have the lands; the entry of the heir on the lands devised to *B.* is a breach, *Anonymous*, 7

2. A breach cannot be assigned on a bond for performance of covenants, when there is only a clause of re-entry or non-payment of the money, *Suffield v. Baskervil*, 36

C.

CARRIER.

In an action against a common carrier to recover the value of goods delivered to him to carry, he cannot plead that he was *robbed* of them, *Barker v. Warren*, 271

CHANCERY.

See EQUITY.

CHURCH AND CHURCHWARDEN.

1. If a church be out of repair, or so decayed that it cannot be repaired, the bishop of the diocese cannot direct a commission to impower commissioners to tax and rate every parishioner, either to the repairing of it in the one case, or to the re-building of it in the other, *Rogers v. Davenant*, 8

2. Same point, *The Case of Bermondsey Church*, 222, 223

3. A rate made by the churchwardens, by an order of vestry, for the repairing or rebuilding the parish-church, is binding on the parishioners, and payment of it may be compelled in the spiritual court, *ibid.* 8

4. Same point, *Case of Bermondsey Church*, 222, 223

5. And if the church be ruinous, the spiritual court may compel the parish, by ecclesiastical censures, to make a rate for the repair of it, but cannot fix the *quantum* of the rate, *ibid.* 8

6. If the king become intitled to present to a church by reason of a simoniacal contract, his presentee shall not be removed, though the simony be pardoned, *Rex v. Trevil*, 52

7. A person elected churchwarden may be excommunicated for refusing to be sworn in, *Waterfield v. Bishop of Chichester*, 118

8. A rate made for the repair or rebuilding of a parish-church is good, although it exceed the estimate of the expence for such purpose, *Case of Bermondsey Church*, 222, 223

9. A rate made in general terms "for "the repairs of the church," is good, although both the *nave* and the *chancel* are included in the word "*church*," *Case of Bermondsey Church*, 222, 223

10. A prohibition does not lie against a suit in the spiritual court to compel the payment of a rate made, by a vestry of the parishioners, for repairing or re-building the parish-church, *ibid.* 223

11. The tithes of a rectory cannot be *sequestered* for the repairs of the chancel, *Westwyn v. Awbery*, 254

CLERK OF THE PAPERS.

In what manner the office of *clerk of the papers* in the court of king's bench may be granted, *Woodward v. Aſton*, 96

COMMON.

1. The lord of a manor may let out to paſture part of the common, provided he leave ſufficient for the commoners, *Smith v. Feverell*, 7
2. And a general licence *ad ponend. averia* ſhall be intended only of commonable cattle, and not of hogs, &c. but otherwiſe, if the licence be for a particular time, *ibid.* 7
3. A commoner may juſtify pulling down hedges built upon the common, *Maſon v. Cæſar*, 66
4. But if the hedges in ſuch a caſe be pulled down in a riotous manner, the court will grant an information, *Rex v. Wyatt*, 66
5. Freeholders having lands lying together in a common field, may, *by cuſtom*, incloſe them againſt the commoners, *[illegible] v. Thorne*, 105
6. In pleading a preſcription for common for a certain number of cattle belonging to a yard land, he need not ſay *levant* on the yard land: *ſed aliter*, if it be common without number, *Stevens v. Auſtin*, 185
7. If there be a copyholder of a meſſuage and two acres in fee, which the lord afterwards grants and confirms to him in fee *cum pertinentiis*, this new grant will extinguiſh a right of common which the tenant before had in the lord's waſte, *Maſſam v. H[illegible]*, 2[illegible]8.

and

COMMON PLEAS.

1. The court of common pleas may by the common law, grant a *habeas corpus* in all caſes of *miſdemeanor*, *Jones's Caſe*, 198
2. By 16. Car. 1. c. 10. The court of common pleas may grant a *habeas corpus* to any perſon committed by the privy council, 199 *notis*
3. By 31. Car. 2. c. 2. the courts of *common pleas* and king's bench, in *term time*, and any judge of either of thoſe courts, or baron of the exchequer, may, in *the vacation*, award a *habeas corpus* for any priſoner whatſoever, 199 *notis*
4. The court of *common pleas* may make order for the regulation of the Fleet Priſon, 221

COMPURGATOR.

See WAGER OF LAW.

CONDITION.

1. If a deviſe be made upon condition that the heir at law do not moleſt the deviſee by ſuit or *otherwiſe*; the entry of the heir, claiming the lands on the death of the deviſor, is a breach of the condition, *Anonymous*, 7
2. A clauſe in a leaſe, that the leſſee "paying the rent and performing the "covenants on his part to be per-"formed, ſhall quietly enjoy the pre-"miſes," is not a *condition* but a *covenant*, *Hays v. Bickerſtaff*, 35
3. On a condition to make an aſſurance, if thereto requeſted, within ſix months, or to pay three hundred pounds; if the one party do not make the requeſt within the ſix months, the other is diſcharged both from the making of the aſſurance and the payment of the three hundred pounds, *Baſſet v. Baſſet*, 200
4. On a condition to marry *Jane* by ſuch a day, if the obligee marry *Jane* himſelf, the obligor is not liable to the penalty, 201
5. When a condition conſiſts of two parts in the disjunctive, and both are poſſible at the time the bond is made, and afterwards one becomes impoſſible by the act of God, or of the party, the obligor is not bound to perform the other part, *Laughter's Caſe*, 204
6. On a bond, conditioned, that if *A.* ſhould work out forty pounds at the uſual prices of packing when *B.* ſhould have occaſion to employ him, or other-

wiſe,

wife, if *A.* ſhall pay forty pounds, &c. *B.* may either take the ſum in *work* or in *money*, at his own election, *Wright v. Bull*, 304

7. If a condition be to deliver ſo many ſhoes to *A.* a common carrier, for the uſe of the obligee, a delivery of them to *the ſervant* of *A.* is ſufficient, *Staples v. Alden*, 309

8. In what caſe the word *pro* makes the contract conditional, 33

CONSIDERATION.

1. The reſervation of a *pepper-corn* is a good conſideration to raiſe a uſe to make a tenant to the *præcipe*, *Barker v. Keate*, 249

2. When money is the conſideration of making a bargain and ſale, it is executed by the ſtatute of uſes, *ibid.* 251

CONSPIRACY.

An action in the nature of conſpiracy lies, after acquittal, for cauſing a perſon to be falſely and maliciouſly indicted for a common treſpaſs, *Norris v. Palmer*, 51

CONSTRUCTION.

A conſtruction ſhall not be made to work a wrong, 116

CONTINUANDO.

If a declaration for a nuiſance for ſtopping water running to a mill, lay the offence with a *continuando* after the time when it appears the nuiſance was abated, yet the plaintiff ſhall recover for the damages done before, *Kendrick v. Bartland*, 253

CONVEYANCE.

1. At common law, there muſt be an actual entry to make a conveyance good; but where a uſe is raiſed, it is executed by the ſtatute without entry, *Barker v. Keate*, 251

2. A fine and a deed to lead the uſes make but one conveyance, *Addiſon v. Otway*, 233

COPYHOLD.

1. If a copyholder in reverſion enter upon the tenant for life, he is *a diſſeiſor*, and a ſurrender by him is void, *Kren v. Kirby*, 32

2. A common recovery ſuffered in the manor court by a copyholder is not a forfeiture of the eſtate; for unleſs there be *a cuſtom* to ſuffer ſuch a recovery, nothing will paſs, *Kren v. Kirby*, 33

3. The lord of a manor only, and no other perſon, can take advantage of the forfeiture of a copyhold eſtate, 33

4. If a copyholder, to ſecure a perſon who has become bound for him, covenant that ſuch perſon ſhall hold and enjoy the copyhold eſtate for ſeven years, and ſo from ſeven years to ſeven years for and during the term of forty-nine years, if the copyholder ſhould ſo long live, it is *a forfeiture* of the eſtate, although there is a clauſe that the deed ſhall be void on the bond being paid; for this deed, though intended only as *a collateral ſecurity*, amounts to a preſent leaſe, *Richards v. Sely*, 79, 80

5. If a copyholder make a leaſe for a year, *et ſic de anno in annum* during ten years, it is a good leaſe for ten years, and a forfeiture of the copyhold eſtate, although warranted to make a leaſe for a year by the cuſtom of the manor, *ibid.* 81

6. The ſteward of a manor may enter on a copyhold forfeited for the non-payment of the fine aſſeſſed upon admittance, without making *a precept* or having a *written authority* from the lord, provided he has made a *perſonal demand* on the tenant, and the tenant has expreſsly refuſed to pay the fine, *Trotter v. Blake*, 229

7. If, on a ſurvey being taken of a manor, the copyholders be decreed to pay *a year's value* to the lord as a fine on every admittance, leaving it uncertain whether it ſhall be computed according to the *improved value*, or according to the rent at the time the decree was made, the lord cannot enter as for a *forfeiture* on the non-payment of

of a fine affeffed according to the improved value, *Trotter v. Blake*, 230

8. The queftion, whether a fine affeffed on admittance to a copyhold eftate be reafonable, or the refufal to pay it a forfeiture, may be tried in an action of *debt* to recover the fine; but an *ejectment* will not lie; for if it be doubtful, it is a proper cafe for *equity*, *Trotter v. Blake*, 231

9. If there be copyholder for life, with remainder for life, and the remainder man for life furrenders the copyhold to a lord *pro tempore* who is a diffeifor of the manor *ut inde faciat voluntatem fuam*, this furrender does not extinguifh the copyhold; but if it had been made to a ftranger, though a diffeifor, it would, after admittance, have been good, *Moor v. Pit*, 287

See Devise.

CORONERS.

1. The fix coroners of the county palatine of *Lancafter* make but one officer; and therefore if a writ be directed to them all, and one of them neglect to execute it, and they all make *a falfe return*, an action will lie againft them all, *Naylor v. Sharplefs*, 24

2. But not if it had been a perfonal tort, 24

CORPORATION.

1. A corporation may be confidered as the occupier of houfe or land, 186

2. A corporation cannot be excommunicated, but the perfons who are members of it may, 255

3. Poffeffions in the hands of an ecclefiaftical corporation may be fequeftered, 257

COSTS.

1. By the ftatute of Gloucefter, 6. Edw. 1. c. 1. f. 2. it is provided, that the demandant may recover againft the tenant the cofts of *the writ* purchafed, together with the *damages*, and that this fhall hold place in all cafes where a man recovers damages, *Thorp v. Fowle*, 58

2. This has been held to extend to the whole cofts of the demandant's fuit, *ibid.* 58

3. And fince this ftatute, it has been ufual to turn *trefpafs* into *cafe*, *ibid.* 58

4. The ftatute 22. & 23. Car. 2. c. 9. f. 149. which gives no more cofts than damages where the damages are under forty fhillings, unlefs the judge certifies that a title was principally in queftion, does not extend to an action for difturbance of common, *Styleman v. Patrick*, 141

5. It is faid to be the conftant practice when a bill is exhibited in equity to foreclofe the right of redemption, if the mortgager be foreclofed, he pays no cofts, *Howard v. Attorney General*, 174

COVENANT.

1. If *A.* covenant to deliver up to *B.* a feat in the church on fuch a day, *Qu.* If the defendant can plead that the feats were pulled down before the day, *Bridges v. Beddingfield*, 28

2. If *A.* covenant with *B.* that *C.* fhall marry *D.* on fuch a day, and *B.* marries *D.* before the day, this fhall excufe *A.*; for the covenantee has rendered the covenant impoffible to be performed, *ibid.* 28

3. If *A.* covenant to affign a leafe to *B.* and *B.* covenant to pay *proinde* fuch a fum of money, thefe are mutual covenants, and therefore *A.* cannot recover the money until he has affigned the leafe, or delivered it to the defendant's ufe and tendered it, *Smith v. Shelbury*, 34

4. A claufe in a leafe, that the leffee "paying the rent and performing the "covenants on his part to be performed, "fhall quietly enjoy the premifes," is *a covenant* and not *a condition*, *Hays v. Bickerftaffe*, 35

5. A breach cannot be affigned on a bond for performance of covenants where there is only a claim of re-entry or non-payment of the money, and no exprefs covenant to pay it. *Suffield v. Bafkerfield*, 36

6. If *A.* covenant with *B.* to pay so much money for tithes, and to be accountable for all arrears of rent; and *B.* covenants to allow certain disbursements upon account; *A.* cannot plead, to an action of covenant for not accounting, that he was ready to account if *B.* would allow him the disbursements; for the covenants being *mutual*, each of them has remedy against the other for non-performance, *Dr. Samways v. Eldesley*, 73

7. The words "it is provided and agreed" amount to a covenant, *ibid.* 77

8. If *A.* covenant that he will not agree for the taking the farm of excise of beer and ale for a particular county without the consent of *B.* and *C.* each of the covenantees may bring covenant for his particular damages, *Wilkinson v. Sir Richard Lloyd*, 82

9. Articles of agreement reciting an intended marriage, covenanting to settle a jointure in consideration of a marriage portion, and concluding thus, "and it is hereby *agreed* that a fine "shall be levied to secure the payment "of the said portion," amount to *a covenant* to levy the fine; and the court of chancery may decree the execution of it, *Hollis v. Carr*, 87

10. Covenant lies whenever there is an agreement under hand and seal, 92

11. The words "yielding and paying" make a covenant, 92

12. If three persons, each claiming a sole right to an advowson, enter into an agreement by indenture to present by turns, they have no remedy against each other but upon the *covenants* in the indenture; but if an act of parliament be made confirming this indenture, and ordaining that they shall be *tenants in common*, an interest is *vested* in each till partition made, *Crossman v. Churchill*, 97

13. If *A.* being seised in fee, make a jointure on his wife for life and die without issue, and the land descend to his brother and heir, and he grants a rent charge to trustees for the use of the wife, in lieu of her jointure, covenanting thereby to pay to *the trustees* so much *per annum* to the use of the widow, with a clause of distress; yet the trustees may maintain covenant for arrear of the annuity against the grantee, notwithstanding the clause of distress, and although this rent charge is executed by the statute of uses; for the remedy is double, either by *distress* or by *action*, *Cook v. Herle*, 138

14. On a covenant to repair, if the breach be assigned that the defendant did not repair, a plea that he did repair, is good after verdict, *Harman's Case*, 176

15. If *A.* covenant to make an assurance of an annuity to *B.* within six months after the death of *C.* and if he refuse to make such assurance when thereto requested by *B.* then to pay three hundred pounds, and if he fail in payment thereof, then to pay such a penalty; *B.* must request of *A.* to make the assurance within the six months, or he discharges *A.* from the covenant, and of course he is not liable to pay the three hundred pounds, *Basset v. Basset*, 200

16. On a covenant to husband and wife, the husband alone may bring the action, *Beaver v. Lane*, 217

17. In an action of covenant to make such a conveyance of lands in *Jamaica* as counsel shall advise; a plea, that counsel advised A BARGAIN AND SALE with the *usual covenants*, is good, without setting out of the covenants particularly, *Gusse v. Elkin*, 239

18. If *A. agree* for himself, his executors, &c. to pay *B.* his proportion of the money that lands shall sell for less than such a sum, "so as *B.* give him "*notice* in writing of the sale," this amounts to a *covenant*, although the words "covenant, grant," &c. are wanting; on which the *executor* of *A.* having notice of the sale, is liable to an action, although no notice was given to his testator, *Harwood v. Hilliard*, 268

19. On

19. On a covenant to pay, "ſo as notice be given in writing," the declaration muſt expreſsly ſtate that notice was given in writing; for ſtating that it was given *according to the form of the condition* is not ſufficient, *Harwood v. Hilliard*, 269

20. In reciprocal covenants, one cannot be pleaded in bar of another, *Hill v. Thorn*, 309

21. In covenant, where the plaintiff declared upon an indenture in which the defendant had covenanted that he was ſeiſed in fee, &c. and would free the premiſes from all incumbrances, in which there was alſo another covenant for quiet enjoyment, a breach aſſigned upon an entry, and eviction by another, concluding *et ſic conventionem ſuam prædictam fregit* in the ſingular number, is good, *Aſter v. Mazeen*, 311

COURT.

1. The ſpiritual court ſhall not be prohibited from citing a perſon choſen churchwarden to take the oath of office; but if they require an oath which tends to accuſe the defendant, a prohibition lies, *Waterfield v. Biſhop of Chicheſter*, 118

2. To print and circulate the proceedings of a court of juſtice with a defamatory intent is a contempt of court, *ibid.* 119

3. The general juriſdiction of the court of king's bench ſhall not be reſtrained by a ſtatute, unleſs there be expreſs negative words to that effect, *Rex v. Moor*, 129

CUSTOM.

1. A common recovery ſuffered in a manor court will not paſs a copyhold eſtate unleſs there be a cuſtom to ſupport it, *Kren v. Kirby*, 33

2. A *cuſtom* to elect a ſcavenger in the borough court of *Southwark* is taken away by an *act of parliament* ordaining that ſcavengers ſhall be choſen in *London* and *Weſtminſter*, and the liberties thereof, according to the ancient uſages thereof, and appointing a new form of election in *all other places*; for the ſtatute, being affirmative, deſtroys a local cuſtom inconſiſtent with it, *Mayor of London v. Gatford*, 39

3. A cuſtom to chuſe ſupervifors of victuals at a court leet is good, *Vaughan v. Wood*, 56

4. A cuſtom for freeholders to incloſe lands *lying together* in a common field, againſt thoſe who have a right of common, is good; and in juſtifying an incloſure under ſuch a cuſtom, it is not neceſſary to aver that the land did lie together; for that ſhall be intended, as they could not be incloſed againſt the commoners if they did not lie together, *Hickman v. Thorne*, 105

5. A cuſtom in *Lincolnſhire*, that the lords of manors in that county ſhall have derelict lands, is ſaid to be reaſonable and good, *The Attorney General v. Turner*, 107

D.

DAMAGES.

1. In treſpaſs and falſe impriſonment for three days, if the defendant, as to the falſe impriſonment, plead *not guilty*, and juſtifies as to the treſpaſs under a *latitat*, and the verdict find the defendant guilty on the ſecond iſſue, and give entire damages, without taking any notice of the firſt iſſue, *Qu.* If good, *Smith v. Hale*, 32

2. *Continuando* laid after a nuiſance abated, yet damages ſhall be recovered for what was done before, *Kendrick v. Bartland*, 253

DAY.

1. In an action of account, if the plaintiff charge the defendant as his bailiff *upon* the 1ſt *March*, and the defendant plead that ſhe was not his bailiff *from* the 1ſt of *March*, he thereby excludes the day, *Brown v. Johnſton*, 146

2. By a release of all demands *until* the 26th *April*, a bond dated on that day is not released, *Nichols v. Ramsel*, 280

DEBT.

1. The plea of *solvit ad diem*, to debt on bond to pay so much money upon making such assurances, must state when the assurances were made, in order that the Court may judge whether the money was immediately paid pursuant to the condition, *Duck v. Vincent*, 33

2. Debt on bond by the chief bailiff of a liberty is good, on *demurrer*, although he do not declare as chief bailiff; for the defendant might have craved *oyer*, and shewn it contrary to the statute, 23. Hen. 6. c. 10. *Simpson v. Ellis*, 36

3. Debt on the statutes of 1. Eliz. c. 2. and 23. Eliz. c. 1. for not coming to church, concluding *per quod actio accrevit eidem domino rege et qua ad exigend. et habend.* for himself and the plaintiff, is good, *Anonymous*, 100

4. Debt for escape lies against the warden of the Fleet as superior; the grantee for life being insufficient, *Plummer v. Whitcot*, 119

5. In debt on a judgment recovered in an inferior court the defendant cannot wage his law, *Beaumont's Case*, 140

6. Debt for rent will not lie against the executor of an original lessor by his lessee after a redemise to him of the whole term, although in the redemise there is a rent reserved; for it operates as a *surrender* of the original lease, *Lloyd v. Langford*, 174

7. But debt will lie for the rent reserved when a lessee for years *assigns* his whole term; for then the original contract still exists, *ibid.* 176

8. To debt brought by an executor against a sheriff to recover money levied on a *fieri facias* under an execution sued out by the testator, the defendant cannot plead the statute of limitations, *Cockram v. Welby*, 212

9. To an action of debt on a judgment the defendant cannot plead that he was committed in execution of this judgment at the suit of the plaintiff to the marshal of the king's bench, and that, not being able to find the plaintiff, he had paid the money to *the marshal* in satisfaction of the judgment, *Taylor v. Baker*, 214

10. Debt will lie for a fine assessed on admittance to a copyhold estate, *Trollin v. Blake*, 231

11. Debt on the statute 5. Eliz. c. 4. for exercising the trade of a silk-weaver not having been an apprentice for seven years, lies in any of the courts at *Westminster*, *Forest qui tam v. Wire*, 246

12. In debt for rent upon a lease for years, in which it is provided, "that "if the rent be behind and unpaid by "the space of a month next after any "or either of the days of payment, "then the lease to be *void*," it must appear that *a demand* was made of the rent, in order to avoid the lease, *Steward v. Allen*, 264

DEED.

When a deed is lost, the party must make oath of it, to entitle himself to a bill in equity to have it performed *in specie*, 173

See CONVEYANCE—FEOFFMENT.

DEMAND.

A demand must be made where an interest is to be determined, *Steward v. Allen*, 264

DEPARTURE.

1. In debt on bond to pay such sums as the defendant should receive at a certain place, if the defendant plead "payment," and the plaintiff reply "non-payment of such a sum received at the place appointed," a rejoinder that the plaintiff "appointed "no place" is *a departure* from the plea, *Sams v. Dangerfield*, 31

2. In

2. In *quare impedit*, if the incumbent plead *in bar*, that at the time of sueing out the writ, the church was full by *collation* on a lapse, and the plaintiff reply, that on such a day and year the patron presented *him* as clerk, with a traverse that the church was full by *collation*; A REJOINDER that the church was full by collation, with a traverse that the patron such *a day and year* presented the plaintiff, is bad; for it is a *departure* from the plea *in bar*, *Stroud v. Horner*, 184

3. In an *assumpsit* for money had and received, a *quantum meruit* for goods sold, and an *insimul computasset*, if the defendant reply the statute of limitations, a replication that this action was an action of *account* is no *departure* from the declaration, *Farrington v. Lee*, 312

DETINUE.

If a person intending a marriage presents the lady with a jewel, and the marriage do not take effect, he may recover it back in an action of *detinue*; for the *present* being made to a *special intent*, it is not such *a gift* as changes the property, *Beaumont's Case*, 141

DEVISE.

1. If lands be devised to *A.* the heir at law of the testator, and other lands be devised to *B.* and that "if *A.* molest "*B.* by suit or otherwise, *B.* shall "have the lands," this is a *limitation*; and if *A.* on the death of his ancestor enter, and claim the lands devised to *B.* it will intitle *B.* to the lands devised to *A.* *Anonymous*, 7

2. If *A.* devises land to *B.* and his heirs, it is in the devisee immediately on the death of the testator; but he cannot bring a promissory action in this title until entry made, *Anonymous*, 8

3. *A.* being seised in fee makes a lease for ninety-nine years to *B* to the uses of his will, and devises his estate "to the heirs of his body of his wife "begotten, and for want of such "issue to the said *B.* in fee;" a *posthumous child* of the testator's, of whom his wife was *ensient* at the time of his death, is entitled to an assignment of the *trust term*, notwithstanding it united, in *B.* with the remainder in fee, *Nurse v. Yearworth*, 9

4. A devise to an infant *en ventre sa mere* is good by the common law, *ibid.* 9

5. Same point, *per* NORTH, *Chief Justice*, *Taylor v. Biddal*, 292

6. A devise of houses "to my son "*Robert*, upon condition that he *pay* "unto his two sisters five pounds "a-year," gives him an estate *in fee*; for as a devise is always intended to be for the benefit of the devisee, such a construction must be made on the words of the will as will prevent the possibility of loss, *Reed v. Hatton*, 25

7. If a devise be made to *A.* upon condition that he pay a sum of money to *B.* and in case of failure that *B.* may enter, this is an executory devise, 26

8. An *alien* who had enjoyed a pension in *Holland* voluntarily sought refuge in *England*, where a devise was made to him "during his *exile* from his "native country," with a limitation over, "in case he is *restored* to his "country, or dies:" the devise is good during his residence in this country, and until he has such provision as may be considered a restoration to his own country, *Paget v. Vossius*, 224

9. On a devise to an *eldest son* and his heirs within four years after the death of the testator, provided the son pay twenty pounds to the executrix towards the payment of the testator's debts; THE SON takes the estate by *purchase*, and not by *descent*, although the testator devised other lands to be sold for the payment of debts, *Brittam v. Charnock*, 286

10. If a devise be made to *A.* the testator's sister and heir "for so long "and *until* her son *B.* attain the age "of twenty-one years; and after he "shall have attained the said age "then to *B.* in fee, and if he die "before

"before the age of twenty-one years, "then to the heirs of the body of *C.* "the father of *B.* and to their heirs "for ever;" *A.* takes an eſtate for years, and the remainder in fee is immediately veſted in *B.*; and if he die before he attains twenty-one years, and in the life-time of *C.* an only ſiſter ſhall take the eſtate, either as heir to her brother, or as heir of the body of her father, *Taylor v. Biddall*, 289

11. A man having iſſue two ſons, *Thomas* his eldeſt ſon, and *Richard* his youngeſt ſon, *Thomas* having iſſue *John*, *Richard* having iſſue *Mary*, deviſed his eſtate to his ſon *Thomas* for life, and afterwards to his grandſon *John* and the heirs male of his body, and if he die without iſſue male, then to his granddaughter *Mary* in tail, and charged it with ſome payments; and then "provided, that if his ſon *Richard* ſhould have *a ſon* by *Margaret* his then wife, *all his eſtate* ſhould be to ſuch "firſt ſon and his heirs, he *paying* as "*Mary* ſhould have done;" the birth of a ſon under this proviſo will not defeat the eſtate limited to *Thomas*; for it only extends to the eſtate limited to *Mary*, *Evered v. Hare*, 293

12. *A.* having *a ſon* and *a grandſon* both of the name of *Robert*, deviſes land to his SON *Robert* and his heirs, and gives a legacy to his GRANDSON *Robert*. The *ſon* dies in the life-time of the teſtator: the teſtator afterwards annexes a codicil to his will, and publiſhes his will *de novo*, declaring that his *grandſon* ſhall have the land as his *ſon* would have enjoyed it if he had lived. The GRANDSON cannot take the lands thus deviſed; for by the death of THE SON the deviſe was void, and therefore could not be revived to *the grandſon* by the parol declaration, *Strode v. Perryers*, 313, 314

DISABILITY.

The diſability of receiving the ſacrament created by ſentence of excommunication, is no excuſe for not accepting the office of ſheriff; for it is incumbent on perſons choſen to remove the diſability, *Sir John Read's Caſe*, 299

DISCHARGE.

A promiſe may be diſcharged by parol before a breach, but not afterwards, 259

DISSEISOR.

If a copyholder in reverſion enter upon the tenant for life, he is *a diſſeiſor*, and a ſurrender by him is void, *Kren v. Kirby*, 33.

DISCONTINUANCE.

1. If a writ of error be brought upon a judgment in debt by *nil dicit* in an inferior court, and error be aſſigned, that after imparlance a day was given to the parties till the next court; this is a *diſcontinuance*, not being a day certain, *Crowder v. Goodwin*, 59

2. If a plaintiff declare for the taking of ſeveral ſorts of grain, and the defendant juſtify the taking of one ſort, but ſay nothing as to the others, it is a diſcontinuance, *Walwyn v. Awbury*, 259

3. Giving a day more than is neceſſary is no diſcontinuance, but where a day is wanting it is otherwiſe, *Buch v. Lengen*, 316

4. *Qu.* If a *blank* left in the place of one of the continuances of a judgment from one time to another be a diſcontinuance? 316

DISTRESS.

1. A diſtreſs for rent could not be made at common law of corn in ſheaves, for by the common law nothing is to be diſtrained but what may be known and returned in the ſame condition as when taken, and corn in ſheaves cannot be returned in the ſame condition, becauſe a great deal may be loſt in the carrying of it home, *Wilſon v. Duchil*, 61

2. But now by 2. Will. & Mary, c. 5. ſ. 3. ſheaves, or cocks of corn, or corn looſe or in the ſtraw or hay, lying or being

being upon any part of the premises demised, may be distrained for rent arrear, and impounded on the premises, or removed on notice to the owner, &c. 61. *notis*

3. If *A.* being seised of lands in fee, make a jointure of so much *per annum* on his wife, and die without issue, and the lands descend to his brother and heir, who grants a rent-charge to *trustees*, to the use of the widow in lieu of her jointure, with a clause of *distress* and a *covenant* to pay the annuity to *the trustees* to the use of the widow, the trustees have a double remedy for the arrears, *viz.* either by *distress* or action of covenant, *Cook v. Herle*, 138

DISTRIBUTION.

1. By the 29. Car. 2. c. 3. s. 25. it is declared, that the statute of distributions shall not extend to the estates of *femes covert* that shall die intestate, but that their husbands shall have administration of their personal estate, and enjoy the same, as they might have done before the act, *Wilson v. Drake*, 20. *notis*

2. If a man make a will and appoint his wife his executrix, and devise a shilling to his daughter and dies, and the executrix, before probate of the will, also dies intestate, the statute 22. & 23. Car. 2. c. 10. extends to this case, and, if there is a distribution, administration shall be committed to the next of kin of the husband; but if there should be no distribution, it must then be according to the will of the testator, *Harris's Case*, 101

3. Brothers and sisters of the half blood are intitled to equal distribution with brothers and sisters of the whole blood, *Smith v. Tracy*, 205

4. By 22. & 23. Car. 2. c. 10. s. 3. "the ordinary may call administrators "to account for the goods of the intestate, and order a just and equal "distribution of what remains clear, "after deducting debts, funerals, and "just expences, amongst the wife and "children, or children's children if "any such be, or otherwise to the "next of kindred to the dead person "in equal degree, or legally representing their stocks *pro suo cuique* "*jure*, according to the following "rules: one third to the wife, and "the residue by equal portions among "the children, or, if any of the children be dead, the legal representatives of such children, except children who have been advanced by "their father equal to the shares of "the other children; or if advanced, "but not equal to the other children, "the residue shall be distributed so as "to make them all equal as nearly as "can be estimated. If no children, "nor any legal representatives, then "one moiety to the wife, and the residue to the next of kin. If no wife, "then all among the children; and "if no child, then to the next of kin; "but no representatives shall be admitted among collaterals after brothers' and sisters' children," 206

DISTURBANCE.

1. A suit in *equity* is not a *legal* disturbance, 55

2. In an action on a condition to pay, "if a person shall be legally charged "by distress, or with any rent due, &c." *coactus fuit* to pay is not a sufficient description of a disturbance, *Calthorp v. Heylon*, 55

3. If, while a recorder, sheriff, or other officer, be taking the poll at an election, any person take away the poll-books or papers, and thereby prevent further proceedings in the poll, this is a disturbance of office, *Shaw v. a Burgess of Colchester*, 228

DOWER.

In dower the tenant may plead an existing lease made by the husband of the demandant before any title to dower accrued, and that he conveyed the reversion; but if it appear to be an old mortgage long since satisfied, it shall not bar the right of the demandant, *Anonymous*, 18

ECCLE-

E.

ECCLESIASTICAL LEASES.

1. A Leafe of the next avoidance made by a chapter that has no dean is void *ab initio*, *Southwell v. Lincoln*, 56

. A leafe made by a bifhop wherein *more* than the accuftomed rent is referved, is good, *Threadneedle v. Lynam*, 57

EJECTMENT.

Ejectment will not lie to recover a copyhold eftate on an entry by the lord as for a forfeiture on the non-payment of a fine affeffed according to the improved value, if it be uncertain whether the fine fhould be according to the value or according to the rent, *Trotter v. Blake*, 231

ELECTION.

1. If a fheriff fuffer a voluntary efcape, the creditor may have, at his election, a new action againft the fheriff, or a *fcire facias* againft the debtor, *Baffett v. Salter*, 136

2. In disjunctive conditions, it is in the election of the obligor to call on the obligee for the performance of either of them, *Bafket v. Bafket*, 201

3. Therefore in debt on bond for the payment of forty pounds, where the condition was, that " if the defendant " fhall work out the faid forty " pounds at the ufual prices in pack- " ing when the plaintiff fhould have " occafion to employ him, or other- " wife fhall pay the forty pounds, " then the bond to be void;" the defendant cannot plead that he was *always ready* to have worked out the forty pounds, but that the plaintiff did never employ him; for it was at the *election* of the plaintiff, and he has determined his election by bringing an action for the money, *Wright v. Bull*, 304

ENTRY.

1. If an heir enter upon the eftate on the death of his anceftor, and claim generally, it fhall be intended that he entered and claimed *as heir*, *Anonymous*, 7

2. There is no need of an entry to avoid an eftate in the cafe of *a limitation*; becaufe thereby the eftate is determined without entry or claim, and the law cafts it upon the party to whom it is limited, and in whom it vefts till he difagrees to it, *ibid.* 8

3. In what cafe an entry *was* by the common law, and *is* now, neceffary to convey an eftate, *Barker v. Keate*, 251

EQUITY.

1. If in a marriage fettlement it is covenanted to levy a fine in order to fecure the marriage portion, EQUITY will decree the execution of the fine *in fpecie*, *Hollis v. Carr*, 87

2. A court of equity may decree the fpecific performance of a covenant, although the bill do not pray relief on that particular ground, *Hollis v. Carr*, 91

3. In all bills in equity, when the lofs of a deed is fuggefted in order to give jurifdiction to the Court, the fact muft be verified by affidavit, *Howard v. Attorney General*, 173

4. If a leffee for years re-demife his whole term to the leffor with a refervation of rent, it operates as a furrender of the original leafe; and therefore he cannot maintain debt for rent againft the *executor* of the original leffor, but muft feek relief in *equity*, *Lloyd v. Langford*, 174

5. The court of chancery may oblige a guardian in foccage to give fecurity where there is proof of infufficiency, *Quadring v. Downs*, 177

6. If it be doubtful whether the fine on a copyhold fhould be according to *the rent* or the *improved value*, it is a proper cafe for equity, *Trotter v. Blake*, 231

7. If a decree in equity appoint a commission to take a survey of a manor, and the commission never issues, the decree is a nullity, *ibid.* 232

ERROR.

1. A *fact* which might have been pleaded, or is admitted by the pleadings, cannot be assigned for error, *Ipsley v Turk,* 194

2. Upon a writ of error in parliament, it cannot be assigned for error, that the chief justice of the king's bench had not taken his oath of office, 194

3. But on a judgment in an inferior court, where A MAYOR is, by virtue of his office, *judge* of the court, it may be assigned for error, that he was not judge, if he has not taken the sacrament as required by THE CORPORATION ACT, 194

4. A writ of error will not lie upon an order made at the *Old Baily* for payment of a fine, *Hammond v. Howell,* 219

5. Judgment may be avoided without a writ of error by a plea, where the party is a stranger to it, *Randal's Case,* 308

ESCAPE.

1. An action will not lie for an escape from execution on a judgment in an inferior court, if it appear that the cause of action did not arise *within the jurisdiction,* although the declaration on which such judgment was obtained alledge that the cause of action did arise within the jurisdiction of the inferior court, *Squib v. Hole,* 29

. If a plaintiff obtain judgment and execution against two joint debtors, and one of them escape, and the plaintiff recover satisfaction for his debt in an action on such escape, the other debtor may be discharged by *audita querela, Alford v. Tremel,* 49, 50

3. If the grantee for life of the custody of a prison be insufficient, the grantor seised in fee shall be liable to an action of debt on an escape; for he who is in the office as *superior* is in such case answerable, *Plummer v. Whitchot,* 119

4. If a sheriff suffer a voluntary escape, the creditor at whose suit he was in custody may have an action against the sheriff, or a *scire facias* against the debtor, *Basset v. Salter,* 136

5. By 8. & 9. Will. 3. c. 27. "if any "prisoner in execution shall escape, "by any ways or means howsoever, "the creditor at whose suit such pri-"soner was charged in execution at "the time of his escape, may retake "such prisoner by any new *capias,* "*capias ad satisfaciendum,* or sue forth "any other kind of execution on the "judgment, as if the body of the "prisoner had never been taken in "execution," 136, *notis*

ESTATE.

1. *A.* being tenant for life, with remainder in tail to his son *B.* remainder to the right heirs of *A.*; the tenant for life levies a fine, with warranty to the use of *C.* in fee, who conveys the estate by bargain and sale to *D.*; this collateral warranty is annexed to and runs with the land; and therefore if *B.* attain the age of twenty-one years in the life-time of his father, and before the warranty attaches, the fine will bar his entry after the death of *A. Williamson v. Hancock,* 14

2. *A.* having two sons *B.* and *C.* and being seised of lands in fee, COVENANTS, in consideration of marriage, *to stand seised* to the use of *A.* and the heirs male of his body, and for want of such issue to his own heirs male, with remainder to his own right heirs in fee; *B.* has issue one son *D.* and five daughters, and dies in the life-time of his father: THE ESTATE *in tail* on the death of *A.* vests in his grandson *D.* by *purchase,* and, on the death of *D.* without issue, goes by *descent* to his uncle *C. per formam doni,* as the heir male of *A. Southcot v. Stowell,* 207

3. On

3. On a devise to an eldest son and his heirs within four years after the death of the testator, provided he pay twenty pounds to the executrix towards the payment of the testator's debts, the son takes the estate by *purchase*, and not by *descent*, although the testator devised other lands to be sold for the payment of debts, *Brittam v. Charnock*, 286

4. If a devise be made to *A.* the testator's sister and heir, " for so long time and " *until* her son *B.* attain the age of " twenty one years; and after he shall " have attained the said age, then to " *B.* in fee; and if he die before the " age of twenty-one years, then to " the heir of the body of *C.* the father " of *B.* and to their heirs for ever;" *A.* takes an estate *for years*, and the remainder in fee is immediately *vested* in *B.*; and if he die before he attains twenty-one years, and in the life-time of *C.* an only sister shall take the estate, either as heir to her brother, or as heir to the body of her father, *Taylor v. Biddall*, 289

ESTOPPEL.

If *A.* recover in *trespass* against *B.* and sue out an *elegit* against his lands; and then a statute pardon the act in which the trespass was committed, and all judgments and executions thereon, the recovery cannot be pleaded by way of *estoppel* to an *audita querela* brought on the statute to be relieved from the judgment, *Benson v. Idle*, 38

ESTREPEMENT.

The writ of *estrepement* is not a returnable writ, 218

EVIDENCE.

1. A *peer*, in giving his evidence in causes between party and party, must be *sworn*; and give his evidence not only upon his *honour* but upon his *oath*, *The Earl of Shaftsbury v. Lord Digby*, 99, 100

2. A decree of the court of chancery may be read in evidence from an *exemplification* under the seal of the court, *Trotter v. Blake*, 231

3. A duplicate of a commission in chancery cannot be read, though the original is destroyed, unless there is proof of its being a true copy, *ibid.* 231

4. In an action in an inferior court, if it appear upon the evidence that the cause of action arose *extra jurisdictionem*, the plaintiff must be nonsuited, *Mendyke v. Stint*, 274

5. A declaration in an *assumpsit* for money laid out and expended, is not supported by evidence of a promise to pay it out of the first profits, *Tissard v. Warcup*, 280

EXCOMMUNICATION.

A corporation cannot be excommunicated, 255

EXCUSE.

1. Where covenants are mutual, non-performance on the one side is no excuse for a breach of covenant on the other side, *Samways v. Eldersley*, 74

2. If a person covenant to deliver seats in a church on such a day, it is no excuse for non-performance of the covenant that the seats were pulled down before the day, *Bridges v. Beddingfield*, 27, 28

EXECUTOR.

1. To debt on bond against an executor, if he plead two judgments, and that he has but such a sum towards satisfaction, the plaintiff may reply that he paid but so much on the first judgment, and so much on the second, and kept them both on foot by fraud and covin, *Mason v. Stratton*, 36

2. An executor *de son tort* cannot retain for his own debt, *Prince v. Rowson*, 51

3. A release of " all right and title" made by an executor before probate, is

is void, for until probate he has only an inceptive, and not a vested right and title to the testator's lands; but a release of "all actions," though before probate, is good, for he has the right of action, *Morris v. Philpot*, 108

4. If an administrator sell a term, and afterwards an executor appear, the sale is void, although the executor renounces the executorship, *Abraham v. Cunningham*, 147

5. An executor of an executor has all the interest that the first executor had, *Abraham v. Cunningham*, 148

6. In *assumpsit* against the defendant as executor, a plea that the testator made one *I. S.* executor, who proved the will, and took upon him the execution thereof, and administered the goods and chattels of the testator, and so concluding in *abatement* with an averment that *I. S.* is still living, is bad; because it does not traverse that he was executor; and for any thing that appears to the contrary on the pleading, both *I. S.* and the defendant may be the executor, *Singleton v. Bawtice*, 168

7. If a lessee for years redemise his whole term to the lessor, with a reservation of rent, it operates as a surrender of the original lease, and therefore he cannot maintain debt for rent against the *executor* of the original lessor, *Lloyd v. Langford*, 174

8. To an action of debt brought by an executor against a sheriff to recover money levied on a *fieri facias* under an execution sued out by the testator, the defendant cannot plead the statute of Limitations, *Cockram v. Welby*, 212

9. The executor or administrator of an EXECUTOR *de son tort* is liable in the same manner as the testator or intestate would have been, *Anonymous*, 294

10. By 30. Car. 2. c. 7. "the executors "and administrators of executors in "*their own wrong*, or of administrators "who shall waste the goods of the de- "ceased, shall be liable in the same "manner as their testator or intestate "would have been if they had been "living," 294, *notis*

11. By 4. & 5. Will. & Mary, c. 24. s. 12. "the executor and adminis- "trator of any executor or adminis- "trator *of right*, who shall waste the "goods of the deceased, shall be "liable, &c." 294, *notis*

EXECUTION.

If a defendant in execution pay the debt and costs to the Marshal, and is thereupon discharged, he may be taken again by the plaintiff, 212

EXECUTORY DECREE.

An executory decree is of no force in equity, *Trotter v. Blake*, 232

EXEMPLIFICATION.

A decree may be read in evidence from an exemplification under the seal of the Court, *Trotter v. Blake*, 231

EXISTENS.

In an information on the statute 4. & 5. Phil. & Mary, c. 8. which inflicts two years imprisonment on any person above the age of fourteen who shall take away an heiress, a charge that the defendant *being* above the age of fourteen, &c. is a sufficient averment that he was above that age, *Rex v. Moor*, 130

EXPLAIN.

If a man grant "*tenementa prædicta, et* "*totum et quicquid habet*;" *Qu.* If these subsequent words shall explain or enlarge the grant? 112

F.

FACTOR.

A Factor cannot sell the goods of his principal upon *credit*, unless he has a special authority for that purpose, even although they be perishable goods, and were in danger of spoiling by remain-

ing longer in his hands for want of buyers; for by his general authority he can only sell for *ready money*, *Anonymous*, 100

2. A factor in whose hands the goods of the principal are burned, or from whose custody they are stolen without any default on his part, is not liable for such loss, *ibid.* 100

FEOFFMENT.

By a *feoffment to uses*, the estate is executed presently; and therefore if there be a feoffment to *A.* for life, remainder to *B.* in fee, and *A.* refuse, *B.* shall enter immediately, because the feoffor parted with his whole estate, *Southcot v. Stowell*, 209

FINE.

1. *A.* being tenant for life with remainder in tail to his son *B.* remainder to the right heirs of *A.* the tenant for life levies A FINE with *warranty* to the use of *C.* in fee, who conveys the estate by bargain and sale to *D.*; this *collateral warranty* is annexed to, and runs with the land; and therefore if *B.* attain the age of twenty-one years in the life-time of his father, and before the warranty attaches, THE FINE will bar his entry after the death of *A.* *Williamson v. Hancock*, 14

2. A fine *de tenementis* in *Golden-lane* is good, though neither vill, parish, or hamlet is mentioned, *Lever v. Hosier*, 48

3. If by a marriage settlement it is covenanted to make a jointure, and the covenanter *agree* to levy a fine in order to secure *the portion*, in consideration of which the jointure is made, the court of chancery will decree the execution of the fine, *Hollis v. Carr*, 87

4. A wife, being tenant *for life* with remainder *in tail* to *A.* remainder to her husband *for life*, and other remainders over, joins with her husband in a fine *sur concesserunt*, by which they grant the estate to themselves for life with warranty, and the warranty descends to the remainder man in tail; *Quære*, If the estate which the husband and wife had in *possession* only passed? or whether not only the estate they had *in possession*, but the estate *for life* which the husband had in remainder after the estate tail, also passed? *Piggot v. the Earl of Salisbury*, 109

5. If there be *a parish* and *a vill* within the parish of the same name, and a fine is levied of lands in the vill and in the deed to lead the uses, the parish is not named, yet as they make but one conveyance, the lands in the parish do pass, *Addison v. Otway*, 233

6. An indenture by an infant to declare the uses of a fine or recovery, make but one conveyance, 239. *notis*

FLEET-PRISON.

1. The houses within the rules of the Fleet are no part of the prison; and if the warden suffer prisoners to be without the walls in the taverns and other houses adjoining to the prison, to the annoyance of the neighbourhood, or the obstruction of process of justice, the court of *common pleas* may remedy the evil in a *summary way*, 221

2. But by 8. & 9. Will. 3. c. 27. the *rules* are considered as a part of the prison, 222. *notis*

FLOTSAM.

1. *Flotsam* need not be condemned, to ascertain the property, as in the case of prizes, *Lady Wyndham's Case*, 294

2. Trover lies for *Flotsam* wrongfully taken after it comes to land, *ibid.* 294

FORBEARANCE.

On a premium to pay in consideration of forbearance, an averment that he did *extunc totaliter abstinere*, &c. without saying *hucusque*, is good after verdict, *Edwards v. Roberts*, 24

FORFEITURE.

1. None can take advantage of the forfeiture of a copyhold estate but the lord of the manor, *Kren v. Kirby*, 33

2. If a ſtatute enact, that "all manors, "meſſuages, lands, tenements, poſſeſ-"ſions, reverſions, remainders, rights, "intereſts, &c. and other things of "*what nature ſoever*," ſhall be forfeited on an attainder of high treaſon, *lands in tail* are forfeited on an attainder of high treaſon; for they ſhall be included under the general words, "other things of what nature ſoever," *Brown v. Waite*, 131

3. By 32. Hen. 8. c. 36. all uſes, rights, entries, conditions, as well as poſſeſſions, reverſions, remainders, and all other things of a perſon attainted of treaſon by the *common law*, are given to the king, 134

4. By 5. & 6. Edw. 6. c. 1. a perſon, on conviction of high treaſon, ſhall forfeit all ſuch lands, tenements, and hereditaments, which he ſhall have of any eſtate of inheritance in his own right in uſe or poſſeſſion, 134

5. Eſtates tail therefore are not now protected by the "*non habet poteſtatem alienandi*" in the ſtatute *de donis*, but are ſubject to forfeiture on an attainder of high treaſon, 134

6. If, on a ſurvey being taken of a manor, the copyholders be decreed to pay *a year's value* to the lord as a fine on every admittance, leaving it uncertain whether it ſhall be computed according to the improved value, or according to the rent at the time the decree was made; the non-payment of a fine aſſeſſed according to the *improved value*, is not *a forfeiture* of the eſtate, *Trotter v. Blake*, 230

7. The queſtion whether a fine aſſeſſed on admittance be reaſonable, or the refuſal to pay it *a forfeiture*, may be tried in an action of debt to recover the fine, *Trotter v. Blake*, 231

FORMEDON.

1. In a FORMEDON *in diſcender*, if the demandant, being brother to the tenant in tail, who died without iſſue, ſet forth, that the land *belonged* to him after the death of the tenant in tail, it is ſufficient, without ſtating that he died without iſſue, *Barrow v. Haggett*, 94

2. In a FORMEDON *in diſcender*, if the demandant count that his eldeſt brother was heir to his father, and that after his death he is now heir, this is not repugnant; for although none can be heir to the father but the eldeſt ſon, yet two may be heirs to one man at ſeveral times, *ibid.* 95

3. But in this caſe the demandant muſt by ſome means make himſelf heir to the tenant in tail, *ibid.* 94

FRACTION.

If there be tenant for life, remainder for life, remainder in fee, and the tenant for life in remainder levies a fine *come ceo*, &c. it ſhall not be intended that he paſſed the eſtate by *fractions*, *viz.* an eſtate in remainder for life and a remainder in fee expectant upon the eſtate tail, *Garret v. Bliſſard*, 114. *cited*

G.

GAMING.

1. By 16. Car. 2. c. 7. "if any perſon "ſhall play at any game other than "for ready money, and ſhall loſe above "one hundred pound at any one time "upon tick, all contracts and ſecurities "for the payment thereof ſhall be "void, and the winner forfeit treble "the ſum loſt," 54

2. If a perſon loſe eighty pound at one time, for which he gives ſecurity, and ſeventy pound more to the ſame perſon at another time, this is not within the 16. Car. 2. c. 7. unleſs the ſeveral meetings were appointed to elude the ſtatute, *Hill v. Pheaſant*, 54

3. But if, by articles made for horſe-racing, it be agreed that the horſes ſhall run on the 1ſt July for fifty pound, and on the 3d of July for fifty pound more, and on the 6th of July for fifty pound more, this is a *contract* within the above ſtatute, *Edgeberry v. Roſſinder*, 54. *notis*

4. A

4. A bond given to a *third person* in discharge of a gaming debt is not void by the statute 16. Car. 2. c. 7. s. 3. if the obligee was not privy that the money, to secure which the bond was given, was money won at play, *Anonymous*, 279

5. But now by 13. Geo. 2. c. 19. horse-racing is allowed, provided the plate, prize, sum of money, or other thing run for, be not under the full, real, and intrinsic value of fifty pound, 54

6. By 9. Ann. c. 14. all securities whatsoever for money or other valuable thing by gaming, are void, 54. *notis*

7. And by force of the 9. Ann. c. 14. all *securities* given for money won at play are absolutely void, even in the hands of *third persons*, though they have paid a valuable consideration for them, and had no notice, nor were any ways privy that they were given for money won at play, 279. *notis*

GRANT.

1. If a manor formerly in the possession of *an abbot*, and to which an advowson was appendant, be granted to *an archbishop* with an exception of the advowson, the appendancy is thereby destroyed; but if the archbishop reconvey the manor to the king, describing the advowson as appendant, a subsequent grant of the said *manor* and *advowson*, "to the said archbishop formerly belonging, and which was re-granted to the king by the said archbishop, and lately in possession of the abbot, *adeo plene* as the said archbishop or abbot had it, or as it was in our hands by any ways and means whatsoever," will pass THE ADVOWSON, though it never did belong to the archbishop, *Rex v. Bishop of Rochester, &c.* 1

2. But a false suggestion will make the king's grant void; as if he grant the manor of *Dale*, reciting that it came to him by *attainder* when it came to him by *purchase*, *Needler v. Winchester*, *cited*, 2

3. But a misrecital in a grant from the crown, that does not touch the king's title or profit, will not vitiate the grant; as where the king, by office found, had the wardship of a manor, and made a grant thereof, reciting, "*quòd quidem manerium in manus nostras seisit, &c.*" which was not true, yet the grant held good, *Lestrange's Case, cited.* 2, 3

4. Where the thing granted is not granted by an express name, there if a falsity be in the description of that thing the grant is void, even in the case of a common person; as if he grant lands lately let to *D.* in such a parish, and the lands were not let to *D.* and were also in another parish, the grant is void, because the lands are not particularly named. By ATKINS, *Justice*, 3

5. A grant of the next avoidance made by a chapter that hath no DEAN, is void *ab initio*, *Southwell v. Lincoln*. 56

6. A grant made by a bishop reserving more than the old accustomed rent, is good, *Threadneedle v. Lynam*, 57

7. A grant of a manor, and of all lands reputed parcel thereof, will pass lands that are not in fact parcel of the manor, if they are found to have been formerly parcel of the manor, and at the time of the grant were reputed to be so, *Lee v. Brown*, 69

8. If a grant be made for ninety-nine years, if *A. B.* and *C.* shall so long live, rendering a heriot, after the death of each of them, as they are named in the deed, and *C.* dies before *A.* and *B.* or either of them; *quære*, Whether the heriot is due on the death of *C.* *Ingram v. Tothil*, 93

9. A grant from the king of certain lands, and also "*totum fundum, et solum, et terras suas contiguè adjacentes quæ sunt aquâ cooperta, vel quæ in posterum de aquâ possunt recuperari*," will not pass lands afterwards gained from the sea, *The Attorney General v. Turner*, 106

10. A grant of *omnia illa messuagia* situate in *A.* is void, if the houses are not situated in *A.* but in another place, *Doddington's Case*, 107

11. *Quære*, If the grant of the stewardship of a manor in reversion is good? *Howard's Case*, 173

12. If *A.* being seised in fee of a manor, grant "the said manor, messuages, "lands, commons, and mines," and the grantee leases "all the messuages, "lands, tenements, and hereditaments, "that he has in the said manor;" the lessee, notwithstanding the word "mines" is omitted in the lease, may work all mines that were *open* at the time of the demise, but he cannot open a *new mine*, *Astry v. Ballard*, 193

13. The word "*grant*" in a lease will make the land pass by way of use, 253

14. A grant of the office of comptroller of the customs, or any other office of trust, to two persons *durante bene placito*, is determined by the death of one of the grantees, *Arris v. Stukeley*, 260

GUARDIAN.

1. If a person seised in fee settle his estate on his son *William* and his wife for their lives, with remainder to his second son in tail, and divers remainders over, without any mention of the reversion in fee; the second son, on the death of the tenants for life without issue, cannot be *in ward* as an *infant*; for he is in by *purchase*, and not by *discent*; and where there is no discent there cannot be a guardian in soccage, *Quadring v. Downs*, 177

2. The court of chancery may oblige a guardian in soccage to give security, *ibid.* 177

H.

HABEAS CORPUS.

1. The court of common pleas may, by the common law, grant a *habeas corpus* to bail a person committed by warrant from a justice of peace for an offence under a penal statute, *Jones's Case*, 198

2. A *habeas corpus ad faciendum, &c.* shall issue of course; but a *habeas corpus ad subjiciendum* must be on motion, *Penrice v. Wynn*, 306

3. By 16. Car. 1. c. 10. if any person shall be committed by the privy council, either the court of king's bench or common pleas may grant a *habeas corpus*, 199. *note*

4. By 31. Car. 2. c. 2. either the court of king's bench or common pleas in *term time*, and any judge of the said courts or baron of the exchequer in *vacation*, may award a *habeas corpus* for any prisoner whatsoever, 199. *note*

HEARTH MONEY.

1. Construction on the statutes imposing this duty, *Bell v. Knight*, 18

2. The manner in which this duty was collected, *Naylor's Case*, 18

HEIR.

1. In debt against an *heir* on the bond of his *ancestor*, if the defendant plead that his ancestor leased his estate for years and that he has no assets *præter* the reversion expectant, the plaintiff may reply generally *assets by discent*; for the reversion is assets, although the *heir* cannot have the benefit of it till the lease is expired, *Osbaston v. Stanhope* 5

2. If a lease be made reserving the rent to the lessor and his executors or his assigns, the heir shall not have it *Ingram v. Tothil*, 9

3. *Sed quære*; for it has been determined that if a lease reserve the rent annually during the term aforesaid to the lessor and his assigns, the heir shall have it though not named, *Sacheverel v. Froggart*, 93. *note*

4. The offence of *stealing an heiress* malum in se, and was therefore indictable at common law, *Rex v. Moor*, 13

5. If a testator devise his estate to his eldest son, provided he pay twent pound

pounds to the executrix towards the payment of his debts, the son takes the estate by *purchase*, and therefore it is not assets in his hands so as to be liable to the bonds of his ancestor, *Brittam v. Charnock*, 286

HORS DE SON FEE.

In what cases *hors de son fee* may be pleaded, *Sherrard v. Smith*, 103

See PLEADING.

HUSBAND AND WIFE.

1. If a *feme sole* have debts due to her by specialties, and marries, her husband shall, on her death, have the administration, although he had not put the bonds in suit during the coverture, *Wilson v. Drake*, 20

2. By 29. Car. 2. c. 3. the statute of Distributions shall not extend to the estates of *femes covert* that shall die inteltate, but their husbands shall have administration of their personal estates, and enjoy the same as they might have done before the making of the said Act 22. & 23. Car. 2. c. 10. 20. *notis*

3. And it has been agreed, that a husband is intitled to administration under the statute 31. Edw. 3. c. 1. as the *best friend* of the wife, 21

4. The personal estate of a *feme covert* consists only of *choses in action*, which the husband may release during the coverture, 21

5. An action by husband and wife against husband and wife for assault and battery is cured by a verdict finding as to the beating of the plaintiff's wife only that the defendants are guilty, and *quoad residuum* not guilty, *Hocket v. Stiddolph*, 66

6. If a husband die leaving his wife his executrix, and she dies before probate, administration of the husband's effects must be to the next of kin of the husband, and not the next of kin of the wife, *Harris's Case*, 101

7. A wife being tenant for life, with remainder *in tail* to *A.* remainder to her husband *for life*, and other remainders over, joins with her husband in a fine *sur concessit*, by which they grant the estate to themselves for life with *warranty*, and the warranty discends to the remainder-man in tail; *quære*, If the estate which the husband and wife had *in possession* only passed? or whether not only the estate in possession, but the *estate for life* which the husband had in remainder of the estate in tail likewise passed? *Piggot v. the Earl of Salisbury*, 109

8. A wife, with the consent of her husband, may make an *appointment* in the nature of *a will*, *Brook v. Sir William Turner*, 170

9. If there be an agreement before marriage that the wife may make a will, and she makes a will accordingly, it shall be good in the nature of an appointment, although the husband do not know when it was made, unless the husband disagree; but his consent shall be implied until the contrary appears, 172

10. If a husband after the death of his wife once assent to a will made by her, he can never afterwards dissent, 172

11. And if after her death the husband come to the executor named in the wife's will, and seem to approve of her choice, by saying, "I am glad she has "appointed so worthy a person," and recommend a coffin-maker to the executor, a goldsmith to make the rings, &c. this is a good *assent*, 172

12. If a husband expresly permit his wife to dispose of her property, very slight evidence is sufficient to presume the continuance of his consent after her death, 173

13. Mere *dissatisfaction* on the part of the husband shall not be considered as a *disagreement*; as if a husband should say, "I hope to set the will aside," or "I hope to bring the executor to "terms," this is not a dissent, 173

14. On a covenant to husband and wife, the husband alone may bring the action, *Beaver v. Lane*, 215

15. Husband seised of a house in right of his wife may bring an action alone for disturbing him in the enjoyment of it, *Frosdick v. Sterling*, 270

J.

JEOFAILS.

1. The statute 16 & 17. Car. 2. c. 8. will aid a mis-trial, where the *venue* is in a proper county, but not where the county is mistaken, *Naylor v. Sharpless*, 24
2. On a promise to pay in consideration of forbearance, averring that he did *extunc totaliter abstinere, &c*, the omission of *hucusque* is aided by the verdict, *Edwards v. Roberts*, 74
3. A verdict will cure an *informal*, but not an *immaterial* issue, *Peck v. Hill*, 137
4. In debt on bond against the defendant as executor, if issue be joined whether he had assets on a particular day, it is an immaterial issue, and not cured by verdict, *Read v. Dawson*, 139

IMPARLANCE.

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IMPLICATION.

In what case a person shall take an estate for life by implication, 208

IMPRISONMENT.

1. False imprisonment will not lie against a judge for committing a juryman for finding against evidence, *Hammond v. Howell*, 218
2. False imprisonment will not lie against an officer for refusing bail, but a special action on the case lies against a sheriff for it, 32

See TRESPASS—PLEADING.

INDEBITATUS ASSUMPSIT.

1. An *indebitatus assumpsit* will lie for rent received by one who pretends a title; for in such case an *account* will lie; and wherever the plaintiff may have *an account*, an *indebitatus assumpsit* will lie, *Arris v. Stukeley*, 262
2. Therefore if a man receive the profits of an office on pretence of title, the person who has a right to the profits may recover them by an action of *indebitatus assumpsit*, as for monies had and received to his use, *ibid.* 262

INDICTMENT.

1. An indictment will lie at common law, as well as on the statute 4. & 5. Philip and Mary, c. 8. for stealing an heiress, *Rex v. Moor*, 130
2. An indictment, though the offence be laid to be done *vi et armis*, will not lie for a *common trespass*, 306. *notis*

INDUCEMENT.

The same certainty is not required in matters of inducement as in other cases, 70

INFANT.

1. A devise to an infant *en ventre sa mere* is good, notwithstanding the statute of 34. Hen. 8. c. 5. says, that a man may devise his land to any person or persons; and an infant unborn not being *in rerum naturâ*, is not in strictness of speech a person, *Nurse v. Yearworth*, 9
2. Probate granted of the will of an infant testator under the age of seventeen is good, for the spiritual court is to judge of the fitness or unfitness of a person to make a will, *Smallwood v. Brickhouse*, 315

INFERIOR COURT.

1. To debt in an inferior court on a bond stated to be made *within the jurisdiction*, to which the defendant pleads *non est factum*, if judgment be given against him, and he is taken in execution, and an action be brought for an escape, in which it is found, by special verdict, that the bond was not made within the jurisdiction, the action will not lie, *Squibb v. Hole*, 29
2. Process in an inferior court, directed *servienti ad clavem*, without saying *ministro curiæ*, is good, *Crowder v. Goodwin*, 59
3. Process from an inferior court returnable at the *next court*, without mentioning

tioning *a day certain*, is good, *Crowder v. Goodwin*, 59

Procefs on a plaint in an inferior court is good, although it do not ftate the name of the plaintiff, *ibid.* 59

5. A juftification under procefs from an inferior court is good, although it do not alledge that the caufe of the plaint arofe within the jurifdiction, *ibid.* 59

6. To a plea of juftification to trefpafs, under procefs from an inferior court, it is not neceffary to alledge that the officer returned the writ, 59

7. An officer is juftified in executing the procefs of an inferior court, although the caufe of the plaint did not arife within the jurifdiction, 59

8. Same point, *Squib v. Hole*, 30

9. Same point, *Higginfon v. Martin and Hadley*, 195

10. An *honour court* cannot hold plea in an *affumpfit* to pay *thirty fhillings* in confideration of work and labour, if the plaintiff lay his damages at *thirty pounds*; for though where damages are laid under *forty fhillings* the cofts may make it more, yet when it is laid to be above *forty fhillings*, all is *coram non judice*, *Reder v. Bradley*, 102

11. Trefpafs *vi et armis* and *contra pacem* may be brought in the hundred court, *Lane v. Robinfon*, 102

12. Juftification under a judgment in an inferior court by *taliter proceffus* is good, *ibid.* 102

13. The fpiritual court may compel a churchwarden to take the oath of office, but not the oath *ex officio*, *Waterfield v. Chichefter*, 118

14. The fpiritual court may adminifter an *oath*, and hold plea in other than *teftamentary* and *matrimonial* caufes, *ibid.* 119

15. The defendant cannot wage his law in an action of debt on a judgment in an inferior court, *Beaumont's Cafe*, 140

16. An inferior court cannot hold plea on a *quantum meruit* for work done out of the jurifdiction, though the promife be made within the jurifdiction, *Beaumont's Cafe*, 141

17. On a judgment in an inferior court, of which A MAYOR, *virtute officii*, is THE JUDGE, if he has omitted to do any thing required by a ftatute, which on fuch omiffion renders his election to the office void, it may be either pleaded in abatement to the jurifdiction of the court below, or affigned for error in the court above, that he is not MAYOR, *Ipfley v. Turk*, 194

18. If a plaintiff declare in an inferior court *ad damnum* fifty pounds, the judgment may be reverfed; for the court cannot hold plea above forty fhillings, *Anonymous*, 207

19. If it appear upon the face of the proceedings in an action in an inferior court that the caufe of action is not within its jurifdiction, or if a plea to the jurifdiction be refufed or prevented by artifice, *a prohibition* will lie at any time, *Mendyke v. Stint*, 274

INFORMATION.

1. An information will lie againft commoners for abating hedges or other obftructions erected on the common, if it be done in a riotous manner, *Rex v. Wyvil*, 66

2. An information *qui tam* lies upon the ftatute 32. Hen. 8. c. 9. for buying a pretended title, *Goodwin v. Butcher*, 67

3. An information will lie in the *king's bench* on the 4. & 5. Philip and Mary, c. 8. for ftealing an heirefs; for although the ftatute enacts, that *the ftar-chamber* may proceed againft offenders by plaint or information, and *the judges of affize* by inquiry or indictment, yet as there are no negative words, the general jurifdiction of the court of *king's bench* is not thereby reftrained, *Rex v. Moor*, 128

Quære, If an information *qui tam* on the 5. Eliz. c. 4. for exercifing the trade of a filk-weaver, not having ferved an apprenticefhip for feven years,

years, lies in the courts at Westminster? *Forest qui tam v. Wire*, 246

5. The *quarter sessions* may proceed by *information* on the statute 5. Eliz. c. 4. *Farren v. Williams*, 247. *notis*

6. To an information *qui tam* the defendant may plead *outlawry* in disability of the plaintiff, although the statute on which the information is founded give *any person* power to inform, *Atkins v. Baylis*, 267

7. An information lies against a person for not taking upon him the office of sheriff, although at the time of his election he is under sentence of excommunication, and thereby rendered incapable of receiving the sacrament, required by the statute 25. Car. 2. c. 2. for it is incumbent on such person to remove the disability, *Attorney General v. Read*, 299

INTENTION.

1. In what cases the intention of the parties shall be considered, 76, 77. 80. 111. 116. 234. 280, 281. 310

2. When a thing shall be intended, and when not, 227. 280. 282

INTEREST.

If three persons, each claiming a sole right to an advowson, enter into an agreement by indenture to present by turns, they have no remedy against each other but upon the covenants of the indenture; but if an act of parliament be made confirming this indenture, and ordaining that they shall be *tenants in common*, an *interest vests* in each until partition made, *Cressman v. Churchill*, 97

JOINDER IN ACTION.

1. If *A*. covenant that he will not agree for the taking the farm of the excise of beer and ale for the county of *York* without the consent of *B*. and *C*. it is not necessary that *B*. and *C*. should join in an action for a breach of this covenant, but each of them may maintain a several action for his respective damages, *Wilkinson v. Lloyd*, 82

2. On a covenant made to husband and wife by a husband and wife for repairing a house, a declaration by the husband alone is good, *Beaver v. Lane*, 217

3. If a husband be seised of a house in right of his wife, the husband alone may bring an action on the case for being disturbed in the enjoyment of it, *Froslick v. Sterling*, 270

4. But when a right of action, if not discharged, survives to the wife, there both husband and wife ought to join, 271

ISSUE.

1. An *immaterial issue* no way arising from the matter is not helped by the statute of Jeofails; as if an action of debt on bond be laid to be made in *London*, and the defendant says that it was made in *Middlesex*, an issue joined thereon is immaterial, *Peck v. Hill*, 137

2. Two affirmatives, or where a traverse issue is joined with an *hoc petit quòd inquiratur per patriam*, cannot make an issue, *Read v. Dawson*, 140

3. If the plea on which the issue is joined has no colour to bar the plaintiff, or if it be against an express rule of law, an issue taken thereon is an *immaterial issue*, and as if no issue at all had been joined, *Read v. Dawson*, 140

4. An issue of which time is made parcel is bad, *Brown v. Johnston*, 145

5. Therefore in *quare impedit*, if to a plea of collation the plaintiff reply a presentation on *such a day*, a rejoinder traversing the presentation on the *day mentioned* is bad, for it is making *time* parcel of the issue, *Stroud v. Horner*, 184

6. The Court will not compel the parties to take issue upon a suggestion in prohibition, when, upon examination, it is found to be false, *Case of Bermondsey Church*, 223

7. A plea though it amount to the *general issue*, yet if it also disclose *matter of law* it is good, *Birch v. Wilson*, 277

JUDGE.

An action will not lie against a judge for what he does judicially, though erroneously, *Hammond v. Howell*, 219

See PLEADING.

JUDGMENT.

Judgment may be avoided by plea, without a writ of error, 308

JURISDICTION.

1. In debt in an inferior court on a bond stated to be made *within the jurisdiction* of such court, to which the defendant pleads *non est factum*; if judgment be given against him, and he is taken in execution, and an action be brought for an escape, in which it is found by special verdict, that the bond was not made *within the jurisdiction* of such court, the action will not lie, *Squib v. Hole*, 29
2. For although the plea of *non est factum* is an admission of the jurisdiction of the inferior court, when such court has cognizance of the cause, yet such admission cannot give the court jurisdiction which does not originally belong to it, *ibid.* 30
3. The admittance or consent of parties cannot give jurisdiction to a court, if the court has no jurisdiction over the subject-matter, *Mendyke v. Stint*, 273
4. Therefore if a declaration in an inferior court state the cause of action to be within the jurisdiction, and it appear in evidence that it was not within the jurisdiction, the plaintiff must be nonsuited, 273
5. If it appear upon the face of the pleadings, that the matter is not within the jurisdiction of an inferior court, or a plea to the jurisdiction be prevented by artifice, a prohibition may be granted at any time, *Mendyke v. Stint*, 274

JURY.

1. Formerly where *a peer* was one of the parties in a cause, two or more *knights* were to be returned on the jury, *Lady Northumberland's Case*, 182
2. And if in a county there happened to be only two *knights*, yet both were returnable, though one of them was a *serjeant at law*, and in other cases privileged from serving on juries, *ibid.* 182
3. But now by 24. Geo. 2. c. 18. the challenge to the panel for want of knights, where a peer is a party, is taken away, 182. *notis*

JUSTIFICATION.

1. In an action of trespass against an officer for taking the plaintiff in execution under process of an inferior court, the *plaint* and *process* are sufficient justification to him, although the proceeding was *coram non judice*, *Squib v. Hole*, 20
2. A justification under process from an inferior court is good, although it do not alledge that the cause of the plaint arose within the jurisdiction, *Crowder v. Goodwin*, 59
3. In a plea of justification to trespass, under process from an inferior court, it is not necessary to alledge that the officer returned the writ, *ibid.* 59
4. An officer is justified in executing the process of an inferior court, although the cause of the plaint did not arise within the jurisdiction, *ibid.* 59
5. Justification under a judgment in an inferior court by *taliter processus* is good, *Lane v. Robinson*, 102
6. *Quære*, If to a justification in trespass, under *process* of an inferior court, the plaintiff may reply *de injuriâ suâ propriâ*, &c. *Lane v. Robinson*, 102

K.

KING.

1. If the king be intitled to a presentation by the statute 31. Eliz. c. 6. because

becauſe of a ſimoniacal contract made by the rightful patron, and preſent to the church, and afterwards the ſimony is pardoned by a general pardon, by which all goods, chattels, debts, fines, iſſues, profits, and amerciaments, forfeited by the offence are reſtored, yet the king's preſentee ſhall not be removed; for by the forfeiture an intereſt is veſted in the king, *Rex v. Turvil,* 52

2. So where the king is intitled to the goods of a *felo de ſe*, a ſubſequent act of indemnity ſhall not diveſt the king's right, *Rex v. Turvil,* 54

3. A rent in the king's caſe lies *in render*, and not *in demand*; and therefore where a grant from the crown contains a clauſe of re-entry, "if the "grantee or his heir ſhall be *lawfully* "*charged* with any rent," the grantor is lawfully charged after the rent-day is paſſed, *Calthorp v. Heyton,* 55

4. If the king grant *a manor*, and *a grange* parcel of the manor, and the grantee grant the grange, with a clauſe of diſtreſs in caſe the grantee ſhall be charged with any rent on account of the ſaid *grange*, the whole grange is, by the reſervation, chargeable with the rent, *ibid.* 55

5. When the king's title is not precedent to that of the *terre tenant*, the lands of his receiver ſhall not be liable by 13. Eliz. c. 4. *Attorney General v. Alſton,* 247

6. In what caſes the king, before the ſtatute 1. William & Mary, c. 2. might have *diſpenſed* with particular ſtatutes, *Arris v. Stukeley,* 261

7. A perſon diſabled by outlawry may ſue for THE KING, though he cannot ſue for himſelf, 267

8. The defendant cannot juſtify in *ſcandalum magnatum* on the 5. Rich. 2. c. 5. becauſe the king is a party, 166

L.

LEASE.

. The word "covenant" will make a leaſe, though the word "grant" be omitted, *Richards v. Sely,* 79

2. A deed that the perſon ſhall "hold and "enjoy the premiſes from ſeven years "to ſeven years, for and during the term "of forty-nine years," with A PROVISO "that it ſhall be void on payment of ſo "much money," though intended only as a collateral ſecurity, amounts to a preſent leaſe, *ibid.* 80

3. If a leſſee for years re demiſe his whole term to the leſſor, though with a reſervation of rent, it operates as a ſurrender of the original leaſe, *Lloyd v. Langford,* 174

4. If there be a proviſo in a leaſe, "to "be void if the rent be behind and "unpaid by a month after any of the "days of payment," a demand muſt be made of the rent to determine the leaſe, *Steward v. Allen,* 264

5. If a leaſe be made with an exception of the trees, and a power to the leſſor to enter and cut them down, he may aſſign this power to another perſon; but if ſuch power be not properly purſued, the leſſee may maintain treſpaſs both againſt the leſſor and his aſſignee, *Warren v. Arthur,* 317

LIBEL.

To print and circulate the proceedings of a court of juſtice with a defamatory intent is libellous, *Waterfield v. Biſhop of Chicheſter,* 119

LIBERTIES.

1. The word "*liberty*" properly ſignifies a right, privilege, or franchiſe, but improperly the *extent of a place*, *Lever v. Hoſier,* 48

2. Liberties in judgment of law are incorporeal, 48

LIMITATION OF ACTIONS.

1. The ſtatute of 21. Jac. 1. c. 16. extends to an action of *indebitatus aſſumpſit*; for though *treſpaſs* only is mentioned, yet all actions *on the caſe* are within the equity of the proviſo, *Croſier v. Tomlinſon,* 71

2. Same point, *Farrington v. Lee,* 312

3. Debt upon an eſcape is not within the ſtatute, but an action for eſcape is, 72

hotis

4. The

4. The ſtatute of Limitations cannot be pleaded to an action of debt brought by an executor againſt a ſheriff to recover money levied on a *fieri facias* under an execution ſued out by the teſtator, *Cockram v. Welby*, 212

5. The ſtatute of Limitations cannot be pleaded to an action of *account* between a merchant and his factor, *Farrington v. Lee*, 312

LIMITATION OF ESTATE.

1. On a deviſe of lands to *A.* the heir of the deviſor, and of other lands to *B.* a ſtranger, " and if *A.* moleſt *B.* " by ſuit or otherwiſe he ſhall loſe " what is deviſed to him, and it ſhall " go to *B.*" theſe words make *a limitation* and not *a condition*; for if a condition, it would deſcend to the heir, and ſo be void, becauſe he cannot enter for the breach, *Anonymous*, 7

2. So "*paying*," in the caſe of the eldeſt ſon, makes a limitation, *ibid.* 7

3. So where the teſtator deviſed his eſtates to his daughter, " provided " and upon condition that ſhe marry " with the conſent of the truſtees," theſe words make a limitation, *Porter v. Fry, cited*, 7

4. When an eſtate is *limited* to another, there is no need of an entry to avoid the eſtate; for the law caſts it upon the party to whom it is limited, *Anonymous*, 8

LIVERY.

1. If a deed be made to three perſons, *habendum* to two for their lives, with remainder to the third for his life, LIVERY made to all three, *according to the form of the deed*, is good, although made as if they had all eſtates in poſſeſſion, *Norris v. Triſt*, 78

2. If a feoffment be made of two acres, and a letter of attorney be made to give livery, and the attorney enter only into an acre, and give livery *ſecundum formam chartæ*, both the acres paſs, *ibid.* 78

3. The matter of livery upon indorſements of writing is now always favourably expounded, unleſs when it plainly appears that the authority is not purſued at all, *ibid.*

M.

MANDAMUS.

A *mandamus* to ſwear one who was elected to be one of the eight men of *Aſhbourne Court* refuſed for uncertainty, for it ought to be ſpecially ſtated what *the office* is, *Anonymous*, 316

MALICIOUS PROSECUTION.

1. If an indictment be preferred for a *common treſpaſs*, and the defendant be *acquitted*, the proſecution ſhall be intended to have been *malicious*, and therefore an action on the caſe will lie againſt the proſecutor, *Anonymous*, 306

2. For though an indictment will not lie for a *common treſpaſs*, yet in an action on the caſe for a malicious proſecution, it makes no difference whether the matter be indictable or not, *Jones v. Gwynne*, 306. *notis*

3. And if the matter be indictable, yet if the proſecution be malicious an action will lie, although the indictment be faulty, *Chambers v. Robinſon*, 306. *notis*

4. But to ſupport this action, both *malice* and want of *probable cauſe* muſt appear, *Johnſton v. Sutton*, 306. *notis*

5. And it muſt alſo appear upon the declaration, that the proſecution is at an end, *Fiſher v. Briſtow*, 306. *notis*

MANOR.

1. An advowſon appendant to a manor being once diſunited from the manor, can never afterwards become appendant, 2

2. The lord of a manor may licenſe another to uſe the common, but the perſon licenſed muſt ſo uſe it as not to diſturb or injure other commoners, *Smith v. Feverel*, 7

3. Nor

3. Nor can the lord of a manor let out to pasture so much of a common as not to leave sufficient for the other commoners, *ibid.* 7

4. Lands formerly parcel of a manor, though severed, shall pass by a grant of the manor, if they were reputed to be parcel thereof at the time of the grant, *Lee v. Brown,* 69

5. *Quære,* If the stewardship of a manor be grantable in reversion? *Howard v. Attorney General,* 173

6. The steward of a manor may enter on a copyhold forfeited for the non-payment of the fine assessed upon admittance, without making *a precept* for seizure, or having *a written authority* from THE LORD, provided he has made a *personal demand* on the tenant, and he has expressly refused to pay the fine, *Trotter v. Blake,* 229

7. If, on a survey being taken of a manor, a copyholder be decreed to pay a *year's value* to the lord as a fine on every admittance, leaving it uncertain whether it shall be computed according to the improved value, or according to the rent at the time the decree was made, the lord cannot enter as for a forfeiture on the non-payment of a fine assessed according to the improved value, *Trotter v. Blake,* 230

8. The surrender of a copyhold for life to a lord who is a disseisor of the manor does not extinguish the copyhold, *Moor v. Pit,* 287

MINES.

1. The place where coals, copper, and ores of all kinds, lie buried under ground, is, before they are worked, called *a vein,* and after they are worked *a mine, Astry v. Ballard,* 193

2. If a man be seised of lands in which there are *mines* open, and *veins* not open, and a lease be made of the lands, *the mines* only, and not the *veins,* pass, and therefore he cannot open *new mines, ibid.* 193

MORTGAGE.

1. Where a bill is exhibited in equity to foreclose the right of redemption, if the mortgagor be foreclosed he pays no costs, *Howard v. Attorney General,* 174

2. A mortgagor in fee cannot have a re-conveyance, upon payment of the money, till the heir comes of age, *ibid.* 174

3. If tenant for life and the remainder-man in fee join in a deed purporting an absolute sale, if it be proved to be but a mortgage he shall have his estate for life again, paying *pro rata* and according to his estate; and so it shall be in the case between tenant in dower and the heir, *ibid.* 174

N.

NEGATIVE.

1. The superior courts are not restrained by an act of parliament, unless by negative words, 128

2. What shall be considered in pleading as a negative pregnant, *Cook v. Hull,* 138

3. In a negative plea that three persons did not do such a thing, it must be said *nec eorum aliquis,* 284

NEW TRIAL.

See TRIAL.

NON DAMNIFICATUS.

Non damnificatus is not a good plea, where the person and lands are to be indemnified, *Shaxton v. Shaxton,* 305

See PLEADING.

NON OBSTANTE.

1. A grant from the crown of lands covered by the sea, *notwithstanding* any mistake or incertainty in the value, quantity, or quality of the land, supplies a defect for want of right instruction given to the king, *Attorney General v. Turner,* 107

2. Before the 1. Will. & Mary c. 2. the king might have dispensed with any statute in which his subjects had no special interest, *Arris v. Stukeley,* 262

3. But

But now by 1. Will. & Mary, c. 2. 'no dispensation by *non obstante* of or 'to *any* statute, or any part thereof, 'shall be allowed, but the same shall 'be void and of none effect, except a 'dispensation shall be allowed in such statute," 262. *notis*

NONSUIT.

In an action in an inferior court, if it appear that the cause of action did not arise within the jurisdiction, the plaintiff shall be nonsuited, *Squib v. Hole*, 30

NOTICE.

1. If a condition be to be performed upon notice in writing, it must be averred in the pleading that the notice was in writing, 268
2. If an agreement be to give notice to *A.* without saying "or his executors and "administrators," yet it is not personal; but after the death of *A.* notice to his personal representatives is sufficient, 268

NUSANCE.

1. An action on the case lies to recover *damages* for a nusance, *Kendrick v. Bartland*, 253
2. But a nusance cannot be abated by a judgment in *case*; but there must, for that purpose, be either an *assize* or a *quod permittat*, 253
3. In an action for a nusance, if it be laid as *continuing* after it has been *abated*, yet the plaintiff shall recover damages for the injury he sustained previous to the abatement, 253

O.

OATH.

By 13. Car. 2. c. 12. the *ex officio* oath used in the spiritual courts is abolished, *Waterfield v. Bishop of Chichester*, 118

. But the spiritual court may compel a churchwarden to take *the oath* of office, and may administer *oaths* in other than *testamentary* and *matrimonial* causes, *ibid.* 119

3. In all bills in equity where the loss of a deed is suggested in order to give jurisdiction to the Court, the fact must be verified on oath, *Howard v. Attorney General*, 173
4. If the spiritual court call a man to take an oath tending to accuse himself, a prohibition lies, *Weeks's Case*, 278
5. A plea *puis darrein continuance* must be verified on oath, *Lovel v. Elstoff*, 307. *cited*

OFFICE AND OFFICER.

1. An officer is justified in taking a man in execution under *process* of an inferior court, although the proceedings are erroneous, *Squib v. Hole*, 29
2. An officer who refuses a good bail-bond on arresting a man on *mesne process* is not a trespasser *ab initio*, *Smith v. Hall*, 32
3. The statute 5. Edw. 6. c. 16. concerning the sale of offices, does not extend to the office of secretary to the governor of *Barbadoes*, *Daw v. Pindar*, 45
4. *Sed quære*: For the office is granted by patent under the great seal of England, *ibid.* 47. *notis*
5. If the office of *clerk of the papers* be granted to two persons for their lives and the life of the longest liver of them, it is an entire office, and *neither* of them can make a deputy or appoint a successor, *Woodward v. Aston*, 95
6. If two persons be appointed jointly to the office of clerk of the papers, a *new grant* made on the surrender of one of the appointees, with the consent of the other, is good, *Woodward v. Aston*, 96
7. The question, Whether a consent to surrender an office was compulsory or voluntary? is a fact for the jury to try, *Woodward v. Aston*, 96
8. *Quære*, If the cancelling of the deed by which an office is granted is an extinguishment of the grant, *ibid.* 96

9. If two men have an office for their lives and the survivor of them, and one of them surrender to the other, and then a new grant is made to this other and a stranger, he has debarred himself of the survivorship, and he and the stranger are jointly seised, *Woodward v. Aston*, 96

10. On a judgment in an inferior court, of which A MAYOR is the *judge*, it may be either pleaded in *abatement* in the court below, or assigned for error in the court above, that *the mayor* had not received the sacrament pursuant to the 13. Car. 2. c. 1.; for the statute having, in such case, rendered the office void, the proceedings were *coram non judice*, *Ipsley v. Turk*, 194

11. *Sed quære*, If the acts of one under such a disability, being regularly instated in such office, and executing the same without objection to his authority, are not valid as to strangers, 194. *notis*

12. By 5. Geo. 1. c. 6. "All persons in "the actual possession of any office "that were required to take the sacrament, &c. shall be confirmed in "their respective offices, and none of "their acts questioned, notwithstanding their omission to take the sacrament as aforesaid," 194. *notis*

13. If, while a recorder, sheriff, or other officer, be taking a poll, any persons take away the poll-book, or other papers, and thereby prevent the poll from proceeding, it is a disturbance of office, *Shaw v. a Burgess of Colchester*, 228

14. If the office of comptroller of the customs, or any other office of trust, be granted by patent to two persons *durante bene placito*, the patent is determined by the death of one of the grantees, *Arris v. Stukeley*, 260

15. A grant from the crown of the office of comptroller of the customs *durante bene placito*, with a general *non obstante* of all statutes, was good before the 1. Will. & Mary, c. 2. *Arris v. Stukeley*, 261

16. If a man receive the profits of an office on pretence of title, the person who has a right to the profits may recover them by an action of *indebitatus assumpsit*, as for monies had and received to his use, *Arris v. Stukeley*, 262

17. A special verdict in *assumpsit* for the profits of a patent office, finding, that the defendant had received the profits for *seven years*, is good, although it appear that the patent had not been made more than *two years*, *Arris v. Stukeley*, 263

18. In covenant, if the breach relate to three covenants, and the declaration concludes *et sic fregit conventionem* in the singular number, yet it is good, *Aster v. Mazeen*, 311

19. To obtain a *mandamus* to be restored to an office, it must appear what the office is, that the Court may judge whether it is of that nature for which the law allows this species of remedy, *Anonymous*, 316

ORDINARY.

1. The ordinary originally had nothing to do with the estate of an intestate; for *bona intestati capi solent in manus regis*, *Abraham v. Cuningham*, 148

2. But by 13. Edw. 1. c. 19. and 31. Edw. 3. c. 11. he has a property in the goods of an intestate, not absolutely and uncontroulably, but *secundum quid*, 148

3. The ordinary cannot grant administration where there is an executor named in the will, *ibid.* 149

OUTLAWRY.

The outlawry of the plaintiff may be pleaded to an action or information *qui tam*, although the penal statute empowers *any person* to sue or prosecute; and if the outlawry be in the same court in which the informer sues, it need not be pleaded *sub pede sigilli*, 267, 268

P.

PARDON.

. A pardon will not divest the king of an interest accruing to him by the offence

offence pardoned. Therefore if the patron of a church be guilty of simony, and the king present, his presentee shall not be removed on the simony being pardoned after the presentation, *Rex v. Turvil*, 52

2. So if the king become intitled by forfeiture to the goods of a *felo de se*, a subsequent pardon of the offence will not divest the king of his right, 53

3. But when nothing vests before office found, a pardon before the requisition extinguishes all forfeitures, 54

PARISH.

1. A *parish* is an ecclesiastical division; it is constituted by ecclesiastical power, and may be altered by the king and ordinary of the place; but a *vill* is a civil division, *Addison v. Otway*, 237

2. A *parish* is under the superintendancy of the *parson*; a *vill* is under the care of the constable, 237

See RECOVERY—FINE—VILL.

PARLIAMENT.

1. On an *adjournment* of a parliament the session continues, but after a *prorogation* all must begin *de novo*, 242

2. In general, an adjournment is made by the house of lords or the house of commons themselves; but the chancellor has adjourned the house of peers *ex mandato domini regis*; and *Queen Elizabeth* adjourned the house of commons by commission under THE GREAT SEAL. By ATKINS, *Justice*, 242

PARTNERS.

1. If one of two partners sign an arbitration-bond "for himself and partner," where such partner is not a party to the arbitration, the partner, though not bound to perform the award, yet a refusal by him to perform it is a breach of the condition, *Strangford v. Green*, 228

2. On a submission to arbitration of all matters concerning a partnership, an award that "all suits shall cease" shall be intended all suits concerning the partnership, *ibid.* 228

PAYING.

1. The word "paying," in the case of an heir, is not a condition, but a limitation, 286

PLACE.

In what case *a place* shall be intended, where it is omitted to be laid in the pleadings, 304

PLEADING.

1. In replevin, if the defendant justify the taking for *a heriot* due upon every alienation without notice, the plaintiff may deny that any heriot is due upon alienation, *Wilcox v. Skipwith*, 4

2. In replevin, a plea acknowledging the taking "*in prædicto loco*" is good, without saying *tempore quo, ibid.* 4

3. If, on an avowry for a heriot, shewing tenure by fealty and *twelve shillings* rent, the plaintiff admit the tenure and traverse the prescription, and the jury find a tenure by fealty and *three shillings* rent, this variance is not material, *ibid.* 5

4. It is a rule, that what the parties have agreed in pleading shall be admitted, though the jury find otherwise, 6

5. To an action of trespass on the case for disturbance of common, the defendant may plead *licence* from the lord of the manor; but he must shew that sufficient common was left for the plaintiff, *Smith v. Feverel*, 7

6. In an action on the case by *a commoner* against the *lord of the manor* for disturbance of common, the commoner must particularly shew the surcharge; but against *a stranger* he may declare generally, that the defendant put in his cattle, *viz.* horses, cows, hogs, &c. *ita quòd communiam in tam amplo modo habere non potuit*, *Smith v. Feverel*, 7

7. On a *scire facias* against heir and terretenants, if the sheriff return the defendant "terretenant" he cannot plead "*non tenure*," and traverse the return, *Whitrong v. Blaney*, 10

8. A sheriff's return of "a *rescous*" cannot be traversed, 10, *notis*

9. In dower the tenant may plead an existing leafe made by the husband of the demandant before any title to dower accrued, and that he conveyed the reversion, *Anonymous*, 18

10. If a bond be to perform an award of two persons, or either of them, it is not sufficient to plead that those two made no award, without saying *nec eorum aliquis*, *Bridges v. Beddingfield*, 27

11. So if a submission be *de præmissis vel aliquâ parte inde*, it is not sufficient to plead "no award," without saying *nec de aliquâ parte inde*, 27

12. In debt on an award that the defendant should deliver up a seat in the church on the first of November following; *quære*, If it be a good plea that the seats were pulled down before that day without his knowledge or consent? *Bridges v. Beddingfield*, 27

13. A declaration in an action in an inferior court must alledge, that the cause of action arose *within the jurisdiction* of the Court, *Squibb v. Hole*, 31

14. In debt on bond conditioned to pay such sums as he should receive at a certain place, if the defendant plead "payment," and the plaintiff rejoin "non-payment of such a sum received "at the place appointed," a rejoinder that the plaintiff "appointed no place" is *a departure* from the plea, *Sams v. Dangerfield*, 31

15. In debt on a bond to pay so much money upon making such assurances, the plea of *solvit ad diem* must state the day when the assurances were made; for otherwise the Court cannot judge whether the money was immediately paid, pursuant to the condition, *Duck v. Vincent*, 33

16. If *A.* agree to assign a leafe to *B.* and *B.* agree to pay *proinde* such a sum of money, the declaration in an action by *A.* to recover the money must aver that he assigned the leafe, *Smith v. Shelbury*, 34

17. The statute 23. Hen. 6. c. 10. relating to sheriffs bonds, is *a public act*, and therefore need not be specially pleaded, *Simpson v. Ellis*, 36

18. If an executor plead two judgments, and no *assets ultra*, a replication that he only paid so much on each, and keeps both on foot *per fraudem*, is good, *Mason v. Stratton*, 36

19. If a bond for the performance of covenants contain only a *proviso*, and no *express covenant*, a breach cannot be assigned, *Suffield v. Baskerville*, 36

20. If *A.* recover in *trespass* against *B.* and after execution taken out a statute pardons the act in which the trespass was committed, *B.* may bring an *audita querela* on this statute to be relieved from the judgment; for the defendant cannot plead the recovery in *trespass* by way of *estoppel*; and if he could, it would be bad with a traverse of the act which constituted the *trespass*, *Benson v. Idle*, 38

21. If a judgment be given for a defendant for a default of the *venue*, or other defect of the declaration, he cannot plead this "judgment recovered" in bar to another action for the same cause, *Rozal v. Lampen*, 42

22. To *assumpsit* upon an *indebitatus* and a *quantum meruit* for fifty pounds the defendant may plead, that after the promise, and before the action, there was an *account stated* between him and the plaintiff, and that upon his promising to pay the balance the plaintiff promised to give him a release, *Milward v. Ingram*, 44

23. In declaring upon a promise, if the plaintiff, stating the time and place, alledge that it was *then and there* made, it shall be intended made *at the instance* of the plaintiff, 45

24. In debt on bond against an *heir*, if the defendant plead that his *ancestor*, under a settlement, leased his estate for years, and that he has no assets *præter* the reversion expectant on the determination of the said leafe, the plaintiff may reply generally, that he has *assets by discent*; for the reversion is assets by discent immediately, although the heir cannot have the benefit of it until the term for years expires, *Osbaston v. Stanhope*, 50

25. In

25. In replevin, if the defendant avow under a grant of *a manor* and *a grange* from the king, containing a clause, that if the grantee shall be *legally charged* on account of the grange, by distress or with any rent, he may enter and distrain, a plea in bar to the avowry, with A TRAVERSE *quod defendens est legitimo modo oneratus*, is bad, *Calthorp v. Heyton*, 54

26. A justification under process from an inferior court need not alledge that the cause of the plaint arose within the jurisdiction of the court, *Crowder v. Goodwin*, 59

27. In a plea of justification under process from an inferior court, it is not necessary to alledge that the officer returned the writ, *Crowder v. Goodwin*, 59

28. If a defendant alledge seisin of a manor, and thereon justifies for trespass for taking a heriot, and the plaintiff replies that *B.* was jointly seised with him, he must traverse that the defendant was sole seised, or it will be bad on demurrer, *Snow and Others v. Wiseman*, 60

29. In a suggestion in prohibition for tithes, if the plaintiff intitle himself by prescription under an abbot, and shews unity of possession by the 31. Hen. 8. c. 1. a plea that the abbey was founded within time of memory, confessing the unity afterwards, is good; for he need not traverse the prescription, *ibid.* 60

30. The omission of a traverse when it is necessary is matter of substance, *ibid.* 60

31. *Tout tems prist* cannot be pleaded after *impurlance*, for *petit licentiam interloquendi* is saying, " I will take my " time and resolve what to do;" and therefore *tout tems prist* is inconsistent with it, *Anonymous*, 62

32. If a plea contain matter *in bar*, and conclude *in abatement*, the defendant, at his election, may take it either *in bar* or *in abatement*, *Stubbins v. Bird*, 63

33. If waste be brought in the *tenet*, the tenant may plead a surrender to the lessor, and demand judgment, because it should have been in the *tenuit*, *ibid.* 65

34. A declaration as administrator, shewing, that *the official* granted the administration is good, without alledging the truth only of the official; but in the case of *a peculiar* a special authority must be shewn, *Daws v. Harrison*, 65

35. To trespass for pulling down hedges the defendant may plead, that he had a right of common in the place WHERE, and that the hedges were made upon his common, so that he could not enjoy his common in as ample a manner, &c. *Mason v. Cæsar*, 66

36. An information *qui tam* for buying a precedent title, stating the lands purchased to be in *A.* and that the son of *B.* conveyed them as descending from his father, and that the defendant bought *B.*'s title, is good; for it is not necessary that the title bought should be a good title, or appear to be so on the face of the pleadings, *Goodwin v. Butcher*, 67

37. In trespass against five for fishing in a several and free fishery, one of the defendants may plead property in his master, and that he did it by his command, and traverse the right of free fishery stated in the declaration; to which the plaintiff may reply *de injuriâ suâ propriâ*, *Wine v. Rider and Others*, 68

38. Where a justification goes to a time and place not alledged by the plaintiff, there must be a traverse of both, *ibid.* 68

39. *Quære*, Whether in pleading a common recovery, if the plaintiff alledge two to be tenants to the *præcipe*, without shewing how they came to be so, or what conveyance was made to them, it is good? *Wakeman v. Blackwell*, 70

40. In a justification to trespass for taking cattle *damage feasant*, it is sufficient for the defendant to say, that he was *possessed* of a term of years, &c. without stating the particular title, *Searle v. Bunneon*, 70

41. In an action for a nusance, if the plaintiff intitle himself generally by

saying that he was *possessed* for a term of years, it it well enough; for not making *title* to his case, he need not set forth particularly the commencement of it, *ibid.* 71

42. If *A.* covenant with *B.* to pay so much money for tithes, and to be accountable for all arrears of rent, and *B.* covenant to allow certain disbursements upon the account, *A.* cannot plead in an action of covenant for not accounting that he was ready to account if *B.* would allow him the disbursements; for the covenants being *mutual*, each of them has remedy against the other for non-performance, *Dr. Samways v. Eldesley*, 74

43. It is a rule in pleading, that every plea must answer the matter which is charged upon the defendant in the declaration, *Samways v. Eldesley*, 75

44. If a submission to arbitration provide "that the award be under *hand* and "*seal*," the pleading such award under *seal* only is bad, *Columbel v. Columbel*, 77

45. A justification in avowry for taking a distress by virtue of a lease for ninety-nine years, if *A. B.* and *C.* should so long live, rendering a heriot after the death of each of them successively as they are named in the deed, must aver, that one of them is alive; and if it state the death of one of them, it must also aver that he died seised, *Ingram v. Tothill*, 93

46. In a FORMEDON *in discender*, where the demandant is brother to the tenant in tail, it is sufficiently shewn that the tenant in tail died without issue to say, that the land *belonged* to him after the death of the tenant in tail, *Barrow v. Haggett*, 94

47. In a FORMEDON *in discender*, a count by the demandant, stating that his eldest brother is heir to his father, and that after his death he is now heir, this is not repugnant, *ibid.* 94

48. In a FORMEDON *in discender*, if the demandant in his writ set out his title after the death of the tenant in tail, and in the count it is only *quæ post mortem*, &c. the additional matter in the writ is supplied to the count by the *et cætera*, *Barrow v. Haggett*, 95

49. A declaration in an action on the statute 2. Rich. 2. c. 5. need not recite the statute, for it is a general law; and such a declaration is good although it recites the statute, and uses the words "*contrafaciat mendacia*" for *devise lies*, and omit the words "*and other*," and although it only alledge that the defendant *dixit mendacia* of the plaintiff, viz. *hæc Anglicana verba sequen.* without alledging that he spoke the words, *Earl of Shaftesbury v. Lord Digby*, 98

50. Although a public statute need not be recited, yet if the party in pleading it undertake to recite it, and mistake in a material point, it is incurable; but if he recite so much of it as will serve to maintain his own action truly, and mistake the rest, this will not vitiate the pleadings, *ibid.* 99

51. A declaration in debt on the statutes 1. Eliz. c. 2. and 23. Eliz. c. 1. for not coming to church, concluding, *per quod actio accrevit eidem domino regi et quer. ad exigend. et habend.* for the king and himself, is good, *Anonymous*, 100

52. To an action of *accrevit* by a *principal* against his *factor*, the factor cannot plead before auditors that the goods were *bona peritura*, and that though he kept them carefully, yet for want of buyers they were in danger of growing worse by remaining any longer in his hands, and therefore he sold them upon *credit* to a man beyond sea; for a factor, unless he has a *special authority*, can only sell for *ready money*, *Anonymous*, 100

53. *Quære*, If a plea in an action of *account*, after judgment *quod computet*, must be verified? *Anonymous*, 101

54. If a declaration in an inferior court in an action of *assumpsit* lay the damages above *forty shillings*, a judgment will be erroneous, *Reder v. Bradley*, 102

55. A plea of justification under process from an inferior court need not set forth particularly all the proceedings in the court below, *Lane v. Robinson*, 102

56. To a justification in trespass under a process from an inferior court, a replication *de injuriâ suâ propriâ absque tali causâ* traverses all the proceedings in the court below, *Lane v. Robinson*, 103

57. *Sed quære*, If such a replication be good, for the plaintiff must answer particularly the authority which the defendant is in such a situation stated to have had from the Court, *Lane v. Robinson*, 103

58. In trespass for taking goods, if the defendant justify by command of the lord of the manor, of whom the plaintiff held by fealty and rent, and that for non-payment of the rent he took the goods by way of distress, the plaintiff may reply, that the place WHERE is *extra*, ABSQUE HOC that it is *infra feodum*, without taking the tenancy upon him, *Sherrard v. Smith*, 103

59. Replevin: If the defendant justifies the taking *damage feasant* on his freehold, and the plaintiff replies in bar that the place WHERE is *common field*, in which he has a prescriptive right as appendant to two acres in another place, the defendant may rejoin *a custom* for every freeholder who has lands *lying together* in the said common field to inclose them against him who has right of common, and he need not aver in such rejoinder that the lands he inclosed *did lie together*, for that shall be intended, or otherwise he could not inclose them: but *quære*, If he ought not to *confess* the plaintiff's right of common, and *avoid* it by alledging the *custom* to inclose? *Hickman v. Thorne*, 104, 105

60. A prescription cannot be pleaded against a prescription without a traverse, *Hickman v. Thorne*, 105

61. In debt by an *executor* against an *administrator* for money due from the *intestate* to the *testator*, the defendant cannot plead a release of all *right and title* granted to him by the plaintiff before probate of the will, *Morris v. Philpot*, 108

62. One bond cannot be pleaded as having been given in discharge of another bond by the same obligor, *Peck v. Hill*, 137

63. But *quære*, Whether to debt against an *administrator* on a bond by the intestate, the administrator may not plead that he gave a bond in *his own name* in discharge thereof? for on the first he could only be charged *de bonis testatoris*, but on the latter he is liable in his own right, *Peck v. Hill*, 137

64. But it is determined, that to an action of debt on bond, a plea that it was given as an indemnity to the plaintiff's testator against another bond is bad, *Mease v. Mease*, 137. *margin*

65. To debt on bond against an administrator, he cannot plead that he gave another bond in his own name in discharge of the first bond, *Peck v. Hill*, 137

66. To debt on bond against an executor, if issue be joined whether he had assets on a particular day, it is bad, *Read v. Dawson*, 139

67. Two affirmatives cannot make an issue, nor can issue be joined after traverse with a *hoc petit*, &c. *ibid.* 140

68. A declaration in case for disturbance of common, setting forth the plaintiff's right to the common only, with a *cumque etiam*, &c. that he had right of common in the place WHERE, and afterwards charging the defendant with doing the damage, THAT is affirmative enough; for this case is not like to an action of TRESPASS, *quare cum* he did a trespass, for then the sense is imperfect, *Styleman v. Patrick*, 142

69. In pleading a prescription for *toll*, the particular kind of toll must be stated; for if it be *toll thorough*, a consideration must be laid; but if it be *toll traverse*, a consideration is implied, *James v. Johnston*, 143

70. Toll or any other profit *à prendre* appurtenant to a manor may be claimed by alledging a *que estate* in the manor, *James v. Johnston*, 144

71. But toll may be prescribed for generally, 144

72. If, in an action of *account*, the plaintiff declare, that the defendant, from the *first of March* to the *first of May*, was his receiver, a plea that he was not receiver from the *first of March* to the *first of May* is bad; for he might have said, that he was not receiver *modo et formâ*; and the time, being immaterial, ought not to have been made parcel of the issue, *Brown v. Johnston*, 145

73. In an action of account against the defendant as receiver of eighty pigs of lead, A PLEA that he did not receive "eighty pigs of lead." without saying "*or any part thereof*," is bad, *Brown v. Johnston*, 146

74. The error that a plea concludes to *the court*, when it ought to conclude to *the country*, must be specially assigned, *Brown v. Johnston*, 146

75. An action on the statute 2. Rich. 2. c. 5. to prevent persons from slandering great men, must be brought *qui tam pro domino rege quàm pro seipso, &c. Lord Townshend v. Dr. Hughes*, 167

76. It has been held, that the defendant in an action of *scan. mag.* on the statute 2. Rich. 2. c. 5. can only *explain* but cannot *justify* the words, because being a *qui tam* action the king is concerned, *ibid.* 167

77. To an action of trespass and false imprisonment, the defendant may plead in justification, that he was servant to THE SHERIFF, attending upon him at the time of *the assize*; that he received a command from the sheriff to bring the plaintiff, being another of the sheriff's servants, from *a conventicle*; and that finding him there, he did *molliter manus imponere* upon the plaintiff, and brought him before his master, *quæ est eadem transgressio, Anonymous*, 167

78. In trespass of assault, battery, wounding, and false imprisonment, a plea of *not guilty* as to the assault and battery, and a *justification* as to the false imprisonment, without saying any thing as to the wounding, is bad; for the whole charge is not answered, *Anonymous*, 167

79. But in such case the Court will permit the defendant to amend his plea, and to plead *not guilty* of the wounding, *Anonymous*, 168

80. In *assumpsit* against a person as executor, A PLEA in *abatement* that the testator made another person executor, who proved the will, and took upon him the execution thereof, must traverse that the defendant was executor, *Singleton v. Bawtree*, 168

81. In covenant to repair, if the breach be assigned generally that he did not repair, a plea that he did repair is good after verdict, *Harman's Case*, 176

82. In trespass of assault, battery, and imprisonment, until the plaintiff should pay *eleven pounds* and *ten shillings*, if the defendant justifies by reason of an execution and a warrant thereon for *eleven pounds*, without mentioning the *ten shillings*, the plea is bad, *Harding v. Fearne*, 177

83. In *quare impedit*, a declaration that *A.* was seised in fee of the manor to which the advowson is appendant, and presented *B.* and then granted the next avoidance to the plaintiff, and that by the death of *B.* he was intitled to present, is good, without stating that the presentation to *B.* was *tempore pacis*, *Stroud v. Horner*, 183

84. If, in *quare impedit*, the incumbent plead *in bar* that at the time of the writ the church was full by *collation* on a lapse, and the plaintiff reply that on such a day and year the patron presented *him* as clerk, and *traverse* that the church was full by collation, A REJOINDER that the church was full by collation, with *a traverse* that the patron such *a day and year* presented the plaintiff, is bad; for it is *a departure* from the plea *in bar*, *Stroud v. Horner*, 184

85. If

85. In *quare impedit*, if, to a plea of collation pleaded in bar, the plaintiff reply a presentation to himself on *such a day*, A REJOINDER traversing the presentation *on the day mentioned* is bad; for it is making *the time* parcel of the issue, *ibid.* 184

86. Where a traverse must conclude to *the country*, and not to *the court*, *ibid.* 184

87. In *quare impedit* the plaintiff must state his title in the declaration; for he must recover by his own strength, and not by his adversary's weakness, 185

88. In pleading a prescription for common for a certain number of cattle belonging to a yard-land, he need not say *levant* upon the good land; *sed aliter* if it be common without number, *Stevens v. Austin*, 185

89. On a judgment in an inferior court, of which *the mayor* is the judge, it may be either pleaded in *abatement* in the court below, or assigned *for error* in the court above, that the mayor had not received the sacrament pursuant to 13. Car. 2. c. 1.; for the statute having, in such case, made his election *void*, the proceedings were *coram non judice*, *Ipsley v. Turk* (*Sed vide* 5. *Geo.* 1. c. 6.), 194

90. To a justification of trespass and false imprisonment under process of an inferior court, if the plaintiff reply that the cause of action did not arise within the jurisdiction, the defendant may rejoin that the plaintiff alledged in his declaration that it did arise within the jurisdiction, *Higginson v. Martin*, 195

91. A justification to trespass under process of an inferior court need not state *the kind* of trespass, whether a *clausum fregit* or other trespass, *Higginson v. Martin*, 195

92. A justification under process of an inferior court, stating the proceedings with a *taliter processus*, &c. is sufficient, *ibid.* 195

93. A justification under process of an inferior court need not state *by what authority* the court was held, *ibid.* 196

94. If a declaration in an inferior court state that the cause of action arose *within the jurisdiction*, and a verdict be given for the plaintiff, the defendant on an action of trespass against *the plaintiff* and *the officer* of the court for arresting under its process, cannot reply to a justification that the cause of action did not arise within the jurisdiction, *Higginson v. Martin*, 196

95. In replevin, if the plaintiff alledge the taking at *A.* and they were taken at *B.* the defendant may plead *non cepit modo et formâ*, but then he can have no return; for if he would have a *retorno habendo*, he must deny the taking to have been where the plaintiff has laid it, and alledge another place in his avowry, *Anonymous*, 199

96. To debt on bond conditioned to grant an annuity "within six months after "the death of *A.* and if he refuse on re- "quest to pay 300l. and if he fail in "payment thereof the bond to be for- "feited," the defendant may plead "*no grant tendered* within the six "months;" for the plaintiff, by not making the request in time, has discharged one part of the condition, and the law will discharge the defendant from the other, *Basket v. Basket*, 200

97. The statute of Limitations cannot be pleaded to an action of debt brought by an executor against a sheriff to recover money levied on a *fieri facias* under an execution sued out by the testator, *Cockram v. Welby*, 212

98. In *assumpsit* on a promise to save the plaintiff harmless in the possession of a house, in consideration of his paying so much a year, an allegation that such a person sued him and recovered judgment is sufficient after verdict, although it is not stated that the disturber had title, *Major v. Grigg*, 213

99. To an action of debt on a judgment, the defendant cannot plead that he was committed in execution on this judgment, at the suit of the plaintiff, to THE MARSHAL of the king's bench, and that, not being able to find the

the plaintiff, he had paid the money to THE MARSHAL in satisfaction of the judgment, *Taylor v. Baker*, 214

100. In an action of covenant to make such conveyance of lands in *Jamaica* as Counsel shall advise, a plea that Counsel did advise a bargain and sale with *the usual covenants* is good, without setting out the covenants particularly, *Goff v. Elkin*, 239

101. A declaration on the statute 29. Eliz. c. 4. by a sheriff for his fees on an execution, stating it to have been made at a session of parliament by *prorogation* held at Westminster 15 February 29. Eliz. is bad on *demurrer*, although the statute is published in the printed copies of the statutes to have been so held; for it appears by the roll, that the parliament begun 29 October, and was *adjourned* from that time to the 15 February, and then *continued* till it was *dissolved*. But being a *particular statute*, of which the Judges will not take notice unless it be pleaded, this mis-recital is aided by *a verdict*; for the defendant, to have taken advantage of it ought to have pleaded *nul tiel record*, *Spring v. Eve*, 241

102. But in a *general statute*, if the party pleading it vary, either in the *year* or the *title* of it, it is a failure of record. By ATKINS, *Justice*, 242

103. Pleadings in an inquisition against the receiver-general of a county, *Attorney-General v. Alston*, 247

104. In an action on the case for stopping water running to the plaintiff's mill, with a *continuando*, A PLEA that the stopping was *contra voluntatem*, and that on such a day, which was between *the first* and *the last* day laid in the *continuando*, the plaintiff himself had abated the nusance, is not good in *bar* of the action; for in an *action on the case* the plaintiff is still intitled to the damages that accrued before the nusance was abated, *Kendrick v. Bartland*, 253

105. In trespass for taking four loads of wheat and four loads of rye, &c. a justification that they were taken by the *churchwarden* from the *rector* under a *sequestration* from the bishop for not repairing the chancel, must aver that the chancel was out of repair, that no more was taken than what was sufficient for the repair, and answer the taking of the different sorts of grain, *Walwyn v. Awberry*, 259

106. In an *assumpsit* on a promise to pay five pounds at the request of plaintiff, in consideration of exchanging horses, the defendant cannot plead that the plaintiff before action brought discharged him of his promise, for the money was due immediately the horses were exchanged; and not being paid, the promise was broken; and then *a parol discharge* is not sufficient, *Edwards v. Weeks*, 259

107. In debt for rent on a lease for years, in which it is "PROVIDED, that if "the rent be behind and unpaid by "the space of a month next after any "or either of the days of payment, "then the lease to be void," A PLEA that the rent was behind a month after the day on which it was reserved to be paid, and so the lease void, is bad, unless it alledge that the rent was demanded; for although the *rent* be due without demand, yet the *interest* shall not be determined without it, which must be expressly laid in the pleading, *Steward v. Allen*, 264

108. An executor cannot plead *non detinet*, except where the testator might have pleaded *nil debet*, *Otway v. Holdips*, 266

109. To an information *qui tam* the defendant may plead in disability that the plaintiff is *outlawed*, although the statute on which the information is brought allows *any person* to inform, *Atkins v. Baylis*, 267

110. Outlawry pleaded in the same court need not be *sub pede sigilli*, *Atkins v. Baylis*, 267

111. In pleading outlawry to a *qui tam* information, the identity of the plaintiff is sufficiently averred by the relative *aforesaid*, 268

112. In covenant against an executor, where the plaintiff and the testator agreed

agreed with each other to repay in proportion to the sum that an estate should sell for less than a certain sum, and the testator covenanted for himself and his executors to pay his proportion to the plaintiff, "so as the plaintiff" (without saying "or his executors or administrators") gave *him* "notice in writing of the said sale by "the space of ten days," the declaration is good, although it aver that notice was given to the *executor*, and does not state any notice given to the executor, *Harwood v. Hilliard*, 268

113. But such a declaration must expressly state, that the notice was given *in writing*; for to say that he gave notice *secundum formam et effectum conditionis* is not sufficient, *Harwood v. Hilliard*, 269

114. If an action against a carrier be laid in *London* for losing goods there which were delivered to him at *Beverly* to be re-delivered at *London*, if the defendant plead that he was robbed of the goods at *Lincoln*, ABSQUE HOC that he lost them at *London*, the plea is bad both in *substance* and in *form*, for robbery is no excuse for a common carrier; but if it were, the *traverse* would be bad, because the justification is not local, *Barker v. Warren*, 271

115. In an action on the case for disturbance of common, A SPECIAL PLEA that *A*. being seised of such lands, with all commons and emoluments to the premises belonging, or therewith used, conveyed them to the defendant; and that the *tenants* and *occupiers* of the said lands, &c. have *used* to have common therein, *virtute cujus* he, having right, did put his cattle in to take common there; and that there was sufficient common both for *the plaintiff* and himself; is a sufficient statement of a right of common; and although it amount to the *general issue*, yet as it also discloses *matter of law* it is good, *Birch v. Wilson*, 274

116. To trespass against several persons for entering into a brewhouse and keeping possession and taking away fifty shillings, if the defendants justify under a warrant from commissioners of excise, by an act of parliament giving them authority to act upon the neglect or refusal of two or more of the justices of the peace, and do not state in his plea that two justices refused to take cognizance of the matter, such justification is bad, *Dashwood v. Cooper*, 284

117. If a plaintiff bring an *insimul computasset*, when in fact there was no *account stated*, the defendant cannot plead a recovery in this action *in bar* to an action of *account* for the same cause, *Rose v. Standen*, 295

118. In debt on a bond for forty pounds, conditioned, "that if the defendant "should work out the said forty "pounds at the usual prices in pack- "ing when the plaintiff should have "occasion, for himself or his friends, "to employ him therein, OR other- "wise to pay the forty pounds, then "the bond to be void," the defendant cannot plead that he was always ready to have wrought out the forty pounds; for the condition being in the *disjunctive*, the plaintiff has his election to take it either in work or in money, *Wright v. Bull*, 304

119. In replevin, a plea by the avowant that an execution taken out, and that a term of years was *extended*, and an assignment thereof made by the sheriff, is good, although no place where the assignment was made is alledged; for it shall be intended to have been assigned where the land lies, *Blackthorn v. Consett*, 304

120. *Non damnificatus* is not a good plea where the person and lands are to be indemnified; for it goes only to the person, and not to the land, *Shaxton v. Shaxton*, 305

121. A plea *puis darrein continuance* pleaded at the assizes cannot be tried there, but must be certified by the judge of assize to the superior court as part of the record of *nisi prius*, *Abbott v. Rudgeley*, 307

122. In debt on a bond against the defendant as administrator, if the defendant plead a *judgment recovered* against the intestate, and no assets *ultra*,

ultra, the plaintiff may reply that there was an action against the inteftate, but that he died before judgment, and that after his death judgment was obtained and kept on foot by fraud, *Randal's Cafe*, 308

123. In debt on an arbitration bond, if two things be awarded, the one within and the other not within the fubmiffion, the breach muft be affigned on that which is within the fubmiffion, *Hill v. Thorn*, 309

124. Reciprocal covenants cannot be pleaded one in bar of another, *Hill v. Thorn*, 309

125. In an *affumpfit* for money had and received, a *quantum meruit* for wares fold, and an *infimul computâffet*, if the defendant plead the ftatute of Limitations, the plaintiff may reply that the action is grounded on the trade of merchants, and that the defendant was his factor, &c. *Farrington v. Lee*, 312

126. A prefcription can only be annexed to an eftate in fee; and therefore a declaration ftating that the plaintiff was feifed of a tenement called *Eaft*, and the defendant of another tenement called *Weft*, and that he and all thofe whofe eftate he had ufed to fetch *pot-water* from the defendant's clofe, is bad; for it only alledges that he was *feifed*, not that he was feifed *in fee*, *Scobel v. Skelton*, 318

127. Ancient grants of franchifes and liberties muft be allowed in *eyre*, or they cannot be pleaded; but a private grant, though made beyond the time of legal memory, may be pleaded, though not allowed; as a grant of a manor from A PRIOR in the reign of Henry the Firft, *James v. Trollop*, 320

128. A declaration in prohibition, fhewing a grant made in the reign of Henry the Firft by a prior who was feifed of a manor and of the tithes thereof *fimul et femel*, as of a portion of the tithes of the faid manor and tithes, paying to the faid prior *five fhillings* a year, and that the fame *modus* was, after the diffolution of priories, paid to the King, &c. and fo pleading a prefcription *modus decimandi* in difcharge of tithes, is good, *James v. Trollop*, 320

POLICY.

On a policy of infurance on a fhip from *A.* to *C.* and from thence to *Briftol*, if fhe fhould arrive there or at any other port of difcharge in *England*, if the fhip touches at *Briftol*, and takes in provifions there, and proceeds from thence without difcharging her cargo, and is loft in her voyage to *Cales*, the underwriters are not liable, *Dunning v. Lafcomb*, 267

POSSESSION.

Poffeffion is fufficient title in an action againft a wrongdoer, *Major v. Grigg*, 213

POSSIBILITY.

1. A poffibility coupled with an intereft may be granted over, 106, 107

2. A grant by an executor of part of the goods of the teftator, although but a poffibility until probate obtained, is good, for he has an intereft in the goods of the deceafed from the time of his death, 108

POWER.

1. A bare power is not affignable; but where it is coupled with an intereft it may be affigned, *Warren v. Arthur*, 317

2. If a leafe be made with exception of the trees, and a power referved to the leffor to enter on the demifed premifes and cut them down, the leffor may affign this power; but if the affignee do not ftrictly purfue it, the leffee may maintain trefpafs both againft the *leffor* and his affignee, *Warren v. Arthur*, 317

PRESCRIPTION.

1. A prefcription for toll appurtenant to a manor may be claimed by a *que eftate* in the manor, *James v. Johnfton*, 144

2. A prefcription can only be annexed to an eftate in fee, *Scobel v. Skelton*, 318

3. In what manner a prefcription may be pleaded, 321

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4. In prescribing for common for a certain number of cattle, it need not say they were *levant et couchant*, *Stevens v. Austin*, 185

PRESENTATION.

1. If a church becomes void by reason of simony in the patron, a presentation by the king is good, although the simony be pardoned; for by the simony the interest vested in the king, *Rex v. Turvil*, 52
2. If there is a right of presentation in three by turns, they are tenants in common, and one of them may grant the next avoidance, *Crossman v. Churchill*, 97
3. If a man get a fee by presentation, and make that his title in a *quare impedit*, he must alledge it to be *tempore pacis*, *Stroud v. Horner*, 185

PRIVILEGE.

1. An attorney arrested on an attachment of privilege shall be discharged on common bail, *Long's Case*, 181
2. Privilege may be superseded by cases of necessity, *Countess of Northumberland's Case*, 182

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1. Process on a plaint in an action in an inferior court is a good excuse for the officer in an action of false imprisonment, *Squib v. Hole*, 29
2. An officer is justified in executing process from an inferior court, although the cause of the plaint did not arise within the jurisdiction, *Crowder v. Goodwin*, 59
3. Process of an inferior court directed *servienti ad clavem* is good, without saying *ministro curiæ*, *Crowder v. Goodwin*, 59
4. Process from an inferior court returnable at the *next court*, without mentioning *a day certain*, is good, *ibid.* 59
5. Process on a plaint in an inferior court is good, although it do not state the name of the plaintiff, *ibid.* 59

PROHIBITION.

1. A prohibition lies to the spiritual court to a suit against parishioners to compel payment of a tax made by order of the bishop towards rebuilding the church, *Rogers v. Davenant*, 8
2. But not if such a rate be made at a vestry of the parishioners regularly summoned, *ibid.* 8
3. A prohibition lies to the spiritual court on a suggestion that the defendant being chosen churchwarden the bishop tendered him an oath *ex officio*, *Waterfield v. Bishop of Chichester*, 118
4. Same point, *Weeks's Case*, 278
5. By 12. Car. 2. c. 12. "No bishop or ecclesiastical judge shall tender or administer to any person whatsoever THE OATH usually called the oath *ex officio*, or any other oath whereby he may be compelled to accuse himself," 279. *notis*
6. A prohibition does not lie to the spiritual court to stop a suit to compel a rate made, at a vestry regularly summoned, by the parishioners, for the repairs of the parish-church, *Case of Bermondsey Church*, 223
7. The Court will not compel the parties to take issue upon a suggestion for a prohibition, where, upon examination, they find it to be false, *ibid.* 223
8. In an action on the case in the sheriff's court, if the declaration alledge that the cause of action arose within the jurisdiction of the court, when in fact it did not, and the defendant neglect to plead to the jurisdiction, the Court will not grant a *prohibition* after verdict and judgment given in the court below, *Mendyke v. Stint*, 272
9. *Quære*, Whether a *prescription* to an aisle in a church, which he and all those, &c. used to repair as belonging to a manor where he had no dwelling-house, but only land, be a good suggestion for a prohibition? *Shambrook v. Fettiplace*, 283
10. Prohibition lies on a libel collusively brought in the spiritual court to dissolve a marriage on the ground of

inceſt, with a view to baſtardize the iſſue, *Anonymous*, 315

11. The ſpiritual court is to judge whether a perſon is capable of making a will, and therefore ſhall not be *prohibited* from granting probate of a will made by an infant, upon a ſuggeſtion that he was under ſeventeen years of age, *Smallwood v. Brickhouſe*, 316

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PROMISE.

1. Where promiſes are mutual, performance need not be averred, 39

2. In *aſſumpſit* on a promiſe to pay five pounds in conſideration of exchanging horſes, the defendant cannot plead a parol diſcharge, *Edwards v. Weeks*, 259

3. But where a promiſe is made to do a thing at a future day, ſuch promiſe may be diſcharged by parol at any time before a breach of the promiſe is made, 259

PUIS DARREIN CONTINUANCE.

1. If in the calling on of a cauſe at the aſſizes the party plead a *puis darrein continuance*, which is demurred to, it muſt be certified to the ſuperior court as part of the *niſi prius* record, *Abbot v. Rugeley*, 307

2. A plea *puis darrein continuance*, when verified by oath, cannot be refuſed by the Court, *Lovel v. Elſtoff*, 307. *cited*

PURCHASE.

1. When the *heir* takes by purchaſe, the anceſtor muſt depart with his whole fee, 208

2. In what caſe the heir ſhall be ſaid to take by *purchaſe*, and not by *diſcent*, 286

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QUARE IMPEDIT.

1. In *quare impedit*, the proceſs, by the common law, was *ſummons*, *pone*, and *diſtreſs infinite*, 264

2. But by the ſtatute Marlberge, 52. Hen. 3. c. 12. it is enacted, "That in "a plea of *quare impedit*, if the "diſturber come not at the firſt day "that he is ſummoned, nor caſt no "eſſoin, then he ſhall be *attached* at "another day; at which day if he "come not, nor caſt no eſſoin, he "ſhall be diſtrained by the *great* "*diſtreſs*; and if he come not then, "by his default, a *writ to the biſhop* "of the ſame place ſhall go, that the "claims of the diſturber for that time "ſhall not be prejudicial to the plaintiff; ſaving to the diſturber his right at another time, when he will ſue for it: and the ſame law ſhall be obſerved in all writs where *attachments* lie, as in making *diſturbance*; ſo that the ſecond attachment ſhall be made by *better pledges*, and afterwards the laſt diſtreſs," 265

3. The ſheriff upon the *attachment* muſt return real mainpernors, and not *John Doe* and *Richard Roe*, or final judgment will be erroneous, *Seal v. Long*, 265

QUE ESTATE.

1. *Toll*, or any other profit *à prendre*, may be appurtenant to a manor, and claimed by alledging a *que eſtate* in the manor, *James v. Johnſton*, 144

2. But a man cannot preſcribe by a *que eſtate* for a rent, advowſon, toll, &c. 144

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1. A common recovery ſuffered in a manor court will not paſs the eſtate, unleſs there is a cuſtom to ſuffer ſuch recovery;

recovery; and therefore, without a custom, it will not work a forfeiture, *Kren v. Kirby*, 33

2. A common recovery suffered of lands in *a liberty* passes lands in *a distinct vill* within the *liberty*, *Lever v. Hosier*, 48

3. A common recovery of lands in a *lieu conus* is good, 49

4. If there be *a parish* and *a vill* within the parish of the same name, and a recovery be suffered of lands in the vill, and in the deed to lead the uses the parish is not named, yet they make but one conveyance, and the lands in the parish do pass, *Addison v. Otway*, 233

5. The reservation of a pepper-corn is a good consideration to raise a use to make a tenant to the *præcipe*, *Barker v. Keat*, 249

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1. A release given by an executor before probate of the will is not good, *Morris v. Philpot*, 108

2. If a conusee release to the cognizor all his right and title to the lands of the cognizor, and afterwards sue out execution, he may extend the lands released, *ibid.* 108

3. So if a debtee release to the debtor all his right and title which he hath to his lands, and afterwards gets a judgment against the debtor, he may extend his moiety of the same lands by *elegit*, *ibid.* 108

4. But a release of all actions made by an executor is good before probate, 108

5. A release made for particular purposes shall not be construed by the general words it contains, but shall be confined in its operation to the special intents of the parties, *Morris v. Philpot*, 108. *notis*

6. A release of all demands *till* the 26 day of April will not release a bond dated on that day, *Nichols v. Ramsel*, 280

7. A release of "all *demands*" will not bar a future *duty*, *Trevil v. Ingram*, 281

8. A release of "all demands" discharges a rent severed from the reversion, 282

9. If there be a submission of a particular difference, and there are other things in controversy, the award of *general releases* is bad, *Hill v. Thorn*, 309

10. If a submission be of all differences till the 10 day of May, and *a release* be awarded to be given of all differences till the 20 day of May, yet the award is good, unless it be shewn that there were differences between those two days, *Hill v. Thorn*, 309

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1. Corn in sheaves, &c. may now be distrained for rent in arrear, *Wilson v. Ducbell*, 61

2. Rent reserved upon a re-demise of a term of years by the original lessee to the original lessor, cannot be recovered in an action of debt; for the re-demise of the whole term operates as a *surrender* of the original lease; but relief may be had in equity, *Lloyd v. Langford*, 174

3. But debt will lie for rent reserved, where a lessee for years makes an *assignment* of his whole term to a stranger, *ibid.* 176

REPLEADER.

REPLEADER.

1. In debt on bond laid to be made in *London*, if the defendant say that it was made in *Middlesex*, and this is tried, it is not aided by the statute 32. Hen. 8. c. 30. but there must be a repleader, *Peck v. Hill*, 137

2. In debt on bond against the defendant as executor, if issue be joined whether he had assets on a *particular day*, it is an *immaterial issue*, and on verdict for the defendant a repleader shall be awarded, *Read v. Dawson*, 139

REPLEVIN.

1. In replevin, if the defendant justify the taking for a heriot due upon every alienation without notice, the plaintiff may deny the heriot being due upon alienation, *Wilcox v. Skipwith*, 4

2. So in replevin, if a plea acknowledge the taking *in prædicto loco* it is good, without saying *tempore quo*, *ibid.* 5

3. On an avowry under a tenure by fealty and *twelve shillings* rent, a verdict finding it to be by fealty and *three shillings* rent is good, for the substance is found, *ibid.* 6

4. In an action of *replevin* both parties are *actors*; for the one sues for *damages*, and the other to have the *cattle*, *Anonymous*, 199

5. In replevin, if the taking be alledged at *A.* the defendant may plead *non cepit modo et formâ*, but then he can have no return; for if he would have a *retorno habendo*, he must deny that the taking was where the plaintiff has laid it, and alledge another place in his avowry, *Anonymous*, 199

6. In replevin, a plea by the avowant that an execution was taken out, and that a term of years was extended, and an assignment thereof made by the sheriff, is good, although no place be alledged where the assignment was made, *Blackburn v. Consett*, 304

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1. When a thing is to be done upon request within six months, or money to be paid, if the request be not made within the time, it is a dispensation of one part of the condition, and the law discharges the other part, 203

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1. On a reservation of rent to the lessor, his executors and assigns, the heir shall not have the rent, 93

2. The reservation of a *pepper-corn* is a good consideration to raise a use, 249

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1. Where a possession vests without entry, *a reversion* will vest without claim, *Anonymous*, 8

2. A fine executed of a reversion by the attornment of lessee for years, 117

SALE.

1. A Sale of goods, though made in market overt, may be defeated by a subsequent agreement between the parties, *Mires v. Solebay*, 243

2. If a horse be bought in a market, for which the vendee is to pay ten pounds, yet the property is not altered, unless the money be paid or the horse delivered; and the vendor may afterwards sell it to another person, *Mires v. Solebay*, 243

3. By 29. Car. 2. c. 3. s. 17. "No contract for the sale of any goods for the price of 10l. or upwards shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged with such contract, "or their agents thereto lawfully "authorised." 244

4. If *A.* and *B.* enter into a verbal agreement for the sale of goods to be delivered to *A.* at a future period, and there is neither *earnest paid*, or *note* or *memorandum* signed, nor any part of the goods delivered, this contract is void within 29. Car. 2. c. 3. *Rondeau v. Wyatt*, 2. *H. Bl. Rep.* 63.

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1. A prisoner in execution on a judgment cannot pay THE GAOLER the money in satisfaction of the judgment, *Taylor v. Baker*, 214

2. On a submission to arbitration respecting 72l. due for rent, AN AWARD that the party shall pay 50l. in full satisfaction of 72l. is good, *Godfrey v. Godfrey*, 303, 304

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1. By 2. Rich. 2. c. 5. "it is straitly "defended, upon grievous pain, that "none devise, speak, or tell any false "news, lies, or other such false things, "of prelates, dukes, earls, barons, "or other great men, &c. whereof "discord or any slander may arise "within the realm," 98

2. The history of this statute, and the reason of making it described, 156

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4. To say to a nobleman, "You are not "for the king, but for sedition and "for a commonwealth, and BY GOD "we will have your head at the next "session of parliament," is actionable upon this statute, *Earl of Shaftesbury v. Lord Digby*, 99

5. A misrecital of the preamble of the statute in a part not material to the point in question will not vitiate the pleadings in an action on this statute, *ibid.* 100

6. The Court will not grant a *new trial* in an action upon this statute, on account of excessive damages, *Lord Townsend v. Dr. Hughes*, 150

7. To say of a peer of the realm, "He "is an unworthy man, and acts "against law and reason," is actionable upon this statute, *Lord Townsend v. Dr. Hughes*, 152

8. To say of an earl, "You like those "who maintain sedition," has been held actionable upon this statute, for it touches him in his dignity and honour, *Lord Cromwell's Case*, 157

9. To say, speaking of a particular nobleman, "My lord is a base earl, "and a paltry lord, and keeps none "but rogues and rascals like himself," is actionable, *Lord Lincoln's Case*, 157

10. So to say of a duke, that "He has "no more conscience than a dog," *Duke of Buckingham's Case*, 157

11. So to say, "He is no more to be "valued than the black dog which "lies there," *Marquis of Dorchester's Case*, 157

12. The offence of scandalizing a peer was at common law punishable by pillory and loss of ears, 162

13. The plaintiff upon this statute must sue *as well for the king as for himself*; and therefore it has been said, that the defendant can only *explain* the words, but cannot *justify* them, *Lord Townsend v. Dr. Hughes*, 166, 167

14. The Court will not order special bail in an action on the statute 2. Rich. 2. c. 5. *Marquis of Dorchester's Case*, 216

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2. But by NORTH, *Chief Justice*, a serjeant at law shall be sued only in the court of common pleas by *bill*, for he is bound by oath to be there, *ibid.* 299

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1. In trespass against for fishing in a several and free fishery, the defendant may plead property in his master, and that he did it by his command, *Wine v. Rider*, 68

2. Trover will not lie against a servant for an unlawful intermeddling with the goods of any person by the command of his master, *Mires v. Solebay*, 242

3. If a condition be to deliver such a quantity of goods to *A.* a common carrier, to the use of the obligee, a delivery of them to the *servant* of *A.* is sufficient, and the *master* shall be bound by such delivery, *Staples v. Alden*, 309

SHERIFF.

1. If a bailiff refuse to take a sufficient bail-bond from a person arrested on *mesne process*, an action on the case will lie against *the sheriff*; but the officer is not a trespasser *ab initio*, *Smith v. Hall*, 32

2. A sheriff's bond shall be intended good until on *oyer* it appear contrary to the 23. Hen. 6. c. 10. *Simpson v. Ellis*, 36

3. The statute 23. Hen. 6. c. 10. relating to sheriffs bonds, is a public act, and need not be specially pleaded, *ibid.* 36. *notis*

4. Same point, *Hall v. Carter*, 305. *notis*

5. An action on the case will not lie against a sheriff for returning "*cepi corpus et paratum habeo*," though party do not appear on the return of the writ; but the proceeding is to rule the sheriff to bring in the body, and then obtain an attachment, *Page v. Tulse*, 83

6. If the sheriff suffer a voluntary escape, the creditor may, at his election, have an action against the sheriff, or a *scire facias quare executionem non* against the debtor, *Bassett v. Salter*, 136

7. A sheriff may justify sending one of his servants, during assize-time, to bring away, *vi et armis*, another of his servants, who is at an alehouse, or conventicle, or other improper place, neglecting his duty, *Anonymous*, 167, 168

8. A sheriff, if he take bail, is not liable to an action, although the bail are insufficient, and the principal do not appear at the return of the writ, but he may be ruled to bring in the body, and upon his neglecting so to do an attachment shall issue, *Ellis v. Yarborough*, 178

9. But an *action* lies against a sheriff for taking insufficient pledges in replevin, *Rouse v. Patterson*, 181. *notis*

10. The Court will not grant an *attachment* against a sheriff for neglecting to take a *replevin bond*, *Rex v. Lewis*, 181. *notis*

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12. An action on the case for negligence lies against an ex-sheriff for omitting to deliver to the new sheriff a writ of *supersedeas*, by reason of which the plaintiff was taken in execution, *Calthrop v. Phillips*, 218

13. By 20. Geo. 2. c. 37. all sheriffs shall, at the expiration of their office, turn over to the succeeding sheriff, by indenture and schedule, all such writs and process as shall remain in their hands, &c. 218. *notis*

14. If, while a sheriff is taking a poll, a person take away the poll-books or other

other papers, it is diſturbing him in his *office*, and an action will lie againſt the diſturber, *Shaw v. a Burgeſs of Colcheſter*, 228

15. An information lies againſt a perſon for not taking upon him the office of ſheriff, although at the time of his election he is under ſentence of excommunication, and thereby rendered incapable of receiving the ſacrament required by 25. Car. 2. c. 2.; for it is incumbent on ſuch perſon to remove the diſability, *Attorney-General v. Read*, 299

16. An undertaking given to the *ſheriff* for the appearance of a party arreſted muſt be in the form directed by 23. Hen 6. c. 10.; but when the undertaking is given to *the plaintiff*, it is not within the ſtatute, *Hall v. Carter*, 304

STATUTES.

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2. Same point, *Ellis v. Yarborough*, 178. *notis*

3. A ſtatute directing that ſcavengers ſhall be choſen in *London* and *Weſtminſter*, and the liberties thereof, according to the ancient uſages of thoſe cities, and appointing a new form of election in *all other places*, deſtroys a *cuſtom* in the borough of *Southwark* to elect ſcavengers in a way contrary to the directions of the ſtatute, *Mayor of London v. Gatford*, 39

4. The ſtatute of 5. Edw. 6. c. 16. concerning the ſale of offices, does not extend to the ſale of the office of ſecretary to the governor of *Barbadoes*, *Daws v. Pindar*, 45

5. The ſtatute of 13. Eliz. c. 10. reſtraining grants by any dean and chapter other than for the term of twenty-one years or three lives, is a public act, *Chapter of Southwell v. Biſhop of Lincoln*, 56

6. The ſtatute 21. Jac. 1. c. 16. extends to *indebitatus aſſumpſit*; for though *treſpaſs* only is mentioned, yet when the ſcope of a ſtatute appears to be in a general ſenſe, the law will extend it to particular caſes within the ſame reaſon, *Croſier v. Tomlinſon*, 73

7. The ſtatute 2. Rich. 2. c. 5. againſt ſlandering great men, is a general law, and therefore need not be particularly recited in a declaration, *The Earl of Shafteſbury v. Lord Digby*, 98

8 The ſtatute 13. Edw. 1. ſt. 2. c. 1. commonly called the ſtatute of HUE AND CRY, although in the printed book it begins, "Foraſmuch as from "day to day robberies, murders, and "*burning of houſes, &c.*" yet in the parliament roll it is only *burnings* generally, *ibid.* 99

9. A public ſtatute need not be recited in pleading; but if the party undertake to recite it, and miſtake in a *material point*, it is incurable, *Lord Shafteſbury v. Lord Digby*, 99

10. If a ſtatute enact, that "all manors, "meſſuages, lands, tenements, poſ-"ſeſſions, reverſions, rights, intereſts, "&c. and all other things, *of what* "*nature ſoever*," ſhall be forfeited on an attainder of high treaſon, *lands in tail* are forfeited, for they ſhall be included in the general words, "other "things of what nature ſoever," *Brown v. Waite*, 131

11. A ſtatute impoſing a duty on "every "*fire hearth* and ſtove in any houſe" extends to *ſmiths forges*, although there is a proviſo exempting "any *blowing-*"*houſe*, ſtamp, furnace, or kiln," from the payment of ſuch duty, *Bell v. Knight*, 182

12. If a ſtatute impoſe a duty on "all "houſes and edifices whatſoever," with directions on non-payment of the duty to diſtrain, houſes in the poſſeſſion of a corporation, though unfiniſhed, and never occupied by any tenants whatſoever, are liable to the duty, and the officer, on demanding payment from the corporation, may, on refuſal, diſtrain the goods as well on the premiſes as elſewhere, *The Company of Ironmongers v. Naylor*, 185

13. The statute 29. Eliz. c. 4. for settling a sheriff's fees on serving an execution, was made at a session of parliament *begun* and held at Westminster on the 29 October, and *adjourned* from that time to the 15 February 29 Eliz. and then continued till it was dissolved; and therefore, if a declaration or other pleading, following the mistake of this fact in the printed editions of the statutes, recite this statute to have been made "at a "session of parliament by prorogation "held at Westminster 15 February "the 29. Eliz." such mis-recital will, on *demurrer*, be bad; but this error is cured by *a verdict*, especially as this is a *particular statute*, of which the Judges are not bound to take notice unless pleaded: and the mis-recital may also be taken advantage of by the plea of *nul tiel record*, *Spring v. Eve*, 241

14. The commencement of a statute shall relate to the first day of the session, although there are words in it declaring, that "it shall take effect "from *the passing* of the act," *Lotless v. Holmes*, 241. *notis*

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SUBSTANCE.

1. In an avowry for a heriot, shewing a tenure by fealty and *twelve shillings* rent, if the jury find the tenure as stated it is sufficient, although they also find that the rent was three shillings; for the substance of the issue is found, *Wilcox v. Skipwith*, 5
2. If a woman have a power given to her by her husband to make a will in the presence of two credible witnesses, and it be pleaded that she made a will in the presence of *A.* and *B.* credible witnesses, and issue be joined thereupon,

upon, a finding that it was made in the presence of C. and D. is good, because the substance is found, *Ellis v. Yarborough*, 179. *cited*

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A *supersedeas* must be delivered over by the old sheriff at the expiration of his office, 217

SURRENDER.

1. A surrender of a copyhold estate by *a disseisor*, as if a copyholder in reversion enter upon the tenant for life, is void, *Kren v. Kirby*, 32

2. If a lessee for years re-demise his whole term to the lessor, though with a reservation of rent, yet it operates as *a surrender* of the original lease, *Lloyd v. Langford*, 174

3. If a lessee for years surrender his whole term to the original lessor upon condition, he may, upon non-performance of the condition, re-enter, and revive the term, *ibid.* 176

4. The surrender of a copyhold for life to a lord who is a disseisor of the manor *ut inde faciat voluntatem suam* is void, and does not extinguish the copyhold; but a surrender to the use of a stranger, though a disseisor, and admittance thereon, is good, *Moor v. Pit*, 287

T.

TAIL.

1. If a statute enact, that "all manors, "messuages, lands, tenements, possessions, reversions, remainders, "rights, interests, &c. and other "things of *what nature soever*," shall be forfeited on an attainder of high treason, *lands in tail* are forfeited, for they shall be included in the general words, "other things of what nature "soever," *Brown v. Waite*, 131

2. Estates tail had no existence at common law, but were created by the statute *de donis*, 134

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TENANTS IN COMMON.

1. Tenants in common need not join in an action of waste, *Curtis v. Bourn*, 62

2. But if tenants in common make a lease for years, and the lessee commit waste, they must join in the action, *ibid.* 62

3. So if a person have only a third part of a reversion in common, he shall not have an action of waste alone, because it would be very inconvenient that the third part should be delivered in execution, 62

4. So if a reversion be granted to two, and the heirs of one of them, they must join in an action of waste, 62

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1. Tithes are not payable for *bricks*, because they are part of the soil, *Stoutfil's Case*, 77

2. *Pigeons* shall not pay tithes, unless it be by special custom, *ibid.* 77

3. An *impropriate rectory* is not chargeable for the repairs of the chancel by the sequestration of the tithes by the bishop, *Walwyn v. Awberry*, 254

TIME.

1. The six months in which, by the statute 2. & 3. Edw. 6. c. 13. s. 14. the suggestion for a prohibition is to be proved, must be reckoned according to *the calendar*, *Sharp v. Hubbard*, 58

2. But generally *a month* is in law accounted a *lunar month*, *ibid.* 58. *notis*

3. But when a statute speaks of *six months*, in a matter which concerns ecclesiastical affairs, as in *quare impedit* in the case of *a lapse*, the time shall be computed according to the calendar, because that is the mode of computation, in such case, in the ecclesiastical courts, *ibid.* 58. *notis*

4. An issue of which time is made parcel is bad, *Brown v. Johnston*, 145

5. Therefore, in *quare impedit*, if to a plea of *collation* the plaintiff reply A PRESENTATION on *such a day*, a rejoinder traversing the presentation *on the day mentioned* is bad, for it is

making

making *time* parcel of the issue, *Stroud v. Horner*, 185

6. In account, if the plaintiff charge the defendant as his receiver *upon* the first of March, and the defendant say that he was not his receiver *from* the first of March, it is an incurable fault; for the word *from* excludes the first of March, and therefore he may have been his receiver *on* that day, *Brown v. Johnston*, 146

7. *Sed quære*; for it is now held, that the word "*from*" shall be taken *inclusively* or *exclusively*, as best answers the *intent* of the parties, *Pugh v. Duke of Leeds*, 146. *notis*

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TOLL.

1. There are two sorts of toll, VIZ. *toll thorough* and *toll traverse*; the one is in the king's highway, and the other in a man's own soil, *James v. Johnston*, 143

2. Toll being a profit *à prendre* may be appurtenant to a manor; and the appurtenancy is not destroyed by the manor having come to the possession of the crown by the dissolution of the monasteries in the reign of Henry the Eighth, *James v. Johnston*, 144

3. In prescribing for *toll*, the particular kind of toll must be stated; for if it be *toll thorough* a consideration must be laid, but if it be a *toll traverse* a consideration is implied, *James v. Johnston*, 143

4. And as toll may be appurtenant to a manor, it may be claimed by alledging a *que estate* in the manor, *James v. Johnston*, 144

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TRADE.

1. An action of debt on the 5. Eliz. c. 4. for using the trade of a *silk weaver* in *London*, not having been an apprentice seven years, lies in any of the courts of Westminster, *Forest qui tam v. Wire*, 246

2. An information *qui tam* on the above statute lies at sessions, *Farren qui tam v. Williams*, 247. *notis*

TRAVERSE.

1. In dower, if the tenant plead an existing lease made by the husband for ninety-nine years before any title of dower accrued, and shew that the lessor afterward granted the reversion to *J. S.* and died; A PLEA that the lessor made a feoffment in fee, with a *traverse* that the reversion was granted to *J. S.* is good, *Anonymous*, 18

2. In trespass against five for fishing in a several and free fishery, one of the defendants may plead property in his master, and that he did it by his command, and traverse the plaintiff's free fishery as alledged by him in his declaration, *Wine v. Reder*, 68

3. In what case a traverse is bad, *Daws v. Pindar*, 45

4. A traverse ABSQUE HOC *quod legitimus modo oneratus* is not good, *Calthorp v. Heyton*, 55

5. If the defendant alledge seisin of a manor, and thereon justify for a heriot, and the plaintiff reply that *B.* was jointly seised with him, he must traverse that the defendant was sole seised, *Snow v. Wiseman*, 60

6. Where a traverse is necessary, and is omitted, it is of *substance*, and makes the pleading ill, 60

7. In what case the omission of a traverse will not vitiate the pleading, 85

8. If one prescription be contrary to another, the first prescription alledged must be traversed, 104

9. When the charge in the declaration is not fully answered, there must be a traverse; as if the defendant be sued as executor, and plead that another person was made executor, 168

10. In what case there may be *a traverse* UPON *a traverse*, 183

11. The sheriff's return cannot be traversed, 10

TRESPASS.

1. In trespass and false imprisonment for taking a man in execution on a judgment in an inferior court, the *pleint* and

and *process* are sufficient to justify the officer, although there was no cause of action arising within the jurisdiction of the court, *Squib v. Hole*, 30

2. Same point, *Higginson v. Martin*, 195

3. If a defendant in custody upon *mesne process* tender a bail-bond, with sufficient sureties, to *the bailiff*, and he refuse it, yet an action of *trespass* will not lie against him, but the party injured may seek his remedy by action on the case against *the sheriff*, *Smith v. Hall*, 32

4. An action lies for falsely and maliciously indicting a man for a common *trespass*, *Norris v. Palmer*, 51

5. It is said, that since the statute of Gloucester, which gives no more costs than damages, it is usual to turn actions of *trespass* into actions on the case, *Thorp v. Fowle*, 58

6. In trespass and false imprisonment for taking the plaintiff in execution under process of an inferior court, the process is a sufficient justification to the officer, although the cause of the plaint did not arise within the jurisdiction, *Crowder v. Goodwin*, 59

7. The plea of justification to trespass under process in an inferior court need not alledge that the cause of the plaint arose within the jurisdiction, or that the officer returned the writ, *Crowder v. Goodwin*, 59

8. In trespass for pulling down hedges, the defendant may justify that he had a right of common in the place WHERE, and that the hedges were made upon his common, so that he could not enjoy his common *in tam amplo modo*, &c. *Mason v. Cæsar*, 66

9. To trespass for taking cattle *damage feasant*, if the defendant justify under a lease, it is sufficient for him to say that he was *possessed* of the place WHERE, without stating a particular title, *Searl v. Bunnien*, 70

10. Trespass *vi et armis* and *contra pacem* may be brought in the hundred court, *Lane v. Robinson* 102

11. To trespass in a hundred court, a justification under a *taliter processus* is good, *Lane v. Robinson*, 102

12. In trespass for taking goods, if the defendant justify by command of the lord of the manor of whom the plaintiff held by fealty and rent, and that for non-payment of the rent he took the goods by way of distress, the plaintiff may reply that the place WHERE is *extra*, ABSQUE HOC that it is *infra feodum*, without taking the tenancy upon him, *Sherrard v. Smith*, 103

13. To trespass and false imprisonment, the defendant may plead in justification, that he was servant to THE SHERIFF, attending upon him at the time of the *assizes*, from whom he received a command to bring the plaintiff, being another of the sheriff's servants, from the conventicle, and that finding him there he did *molliter manus imponere* on the plaintiff, and brought him before his master, &c. *Anonymous*, 167

14. *Quære*, Whether trespass will lie against a plaintiff in an inferior court for suing there for a matter not within jurisdiction, after judgment obtained, on an allegation that the matter did arise within the jurisdiction, and before such judgment is reversed on error? *Higginson v. Martin*, 195

15. A servant cannot justify trespass by the command of his master, *Mires v. Solebay*, 244

16. If a lease be made with exception of the trees, and a power reserved to the lessor to enter and cut them down, he may assign this power to another person; but if it be not properly pursued, the lessee may maintain *trespass* both against the lessor and his assignee, *Warren v. Arthur*, 317

17. In trespass for taking cattle, the defendant justifies for a heriot, and obtains a verdict; yet if it appear that the plaintiff mistook the nature of his action, and that he ought to have brought *trover* instead of *trespass*, this recovery cannot be pleaded in bar to *trover* for the same goods, *Putt v. Royster*, 319

TRIAL

TRIAL.

1. The Court will not grant a *new trial* in an action of *scan. mag.* on account of excessive damages, *Lord Townsend v. Dr. Hughes*,
2. The Court will grant a new trial if the Judge who tried the cause is dissatisfied with the verdict, *Sir Osborn Rands v. Tripp*, 200
3. The Court will not grant a *new trial*, unless the party applying for it can make out a new case, *Mires v. Solebay*, 245

TROVER.

1. To maintain *trover*, property must be proved in the plaintiff, and a conversion by the defendant, *Mires v. Solebay*, 243
2. If *A.* recover in replevin a parcel of sheep, and *B.* as the servant and by the command of *A.* take them, with the assistance of the sheriff's officer, and put them into his master's grounds, a demand and a refusal by *B.* to re-deliver them to their true owner is not a conversion, although the judgment in replevin be wrongly given, *Mires v. Solebay*, 242
3. A special verdict in trover must expressly find the conversion, *ibid.* 245
4. Trover lies to recover *flotsam* wrongfully taken after it comes to land, *Lady Wyndham's Case*, 294

TRUST.

A decree in chancery to enforce the execution of a trust, 88

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VARIANCE.

1. On a declaration for a heriot and *twelve shillings* rent, a verdict finding the heriot and *three shillings* rent is not a fatal variance, *Wilcox v. Skipwith*, * 5
2. So in replevin of cattle taken for a heriot, if the avowant say that the heriot was due upon every alienation *without notice*, and the jury find it due *with or without notice*, the variance is immaterial, *ibid.* 5
3. So in waste, if the plaintiff declare that the defendant cut down *twenty* oaks, and he replies *non succidit viginti quercus præd. nec earum aliquam*, a verdict finding that he cut down *ten* oaks is good, *ibid.* 6
4. If *A.* being seised of the custody of *the Fleet* in fee, grant it to *B.* for life, and *B.* is admitted by rule of court into the office as a man of *estate*; and a declaration in an action against *A.* for an escape, that at the time the grant was made to *B.* and also when the commitment was, and at the time the escape was suffered, and ever since, *B.* was *insufficient*; A VERDICT which does not find that *B.* was insufficient at the time of the action brought, will not support the declaration, *Plummer v. Whitchot*, 127
5. *Sed quære*, If the Court will not, in such case, *intend* that *B.* was insufficient at the time the action was brought? *Plummer v. Whitchot*, 128
6. In an action of false imprisonment, it is not a material *variance* though the writ alledge an imprisonment *generally*, and the declaration state it to be *until* he has paid five pounds, *Higginson v. Martin*, 196
7. *Quære*, If on "*nul tiel record*" a variance in the name of the attorney, of *Gerrard* instead of *Gardner*, between the record pleaded and the record itself, be fatal? *Bill v. Nicholl*, 246
8. If a declaration in covenant against an executor state notice to have been given to the *executor*, and on *oyer* of the deed it appear that the covenant was conditional, "so as the plaintiff "gave notice in writing to the testa-"tor," without saying, "or to his "executors or administrators," yet the *variance* is not material, *Harwood v. Hilliard*, 268
9. On an *assumpsit* for money *laid out and expended*, evidence of a promise to pay it out of the *first profits* is a fatal variance, *Tissard v. Warcup*, 289
10. If an action be brought against several men, and a *nolle prosequi* be entered as to one, and a writ of enquiry awarded against the rest, which recites, that

that the plaintiff did by bill implead (naming those only against whom the inquiry was awarded, and leaving out him who got the *nolle prosequi)*, this is *a variance*; for it ought to have been brought against them all, *Dashwood v. Cowper*, 285

VENUE.

1. In an action against a coroner for falsely returning *non est inventus* to a *capias ad satisfaciendum* issued out of the king's bench, directed to the chancellor of the dutchy of *Lancaster*, the *venue* may be laid either in *Middlesex* where the writ issued, or in *Lancashire* where it was neglected to be executed; for where two matters, both of which are material, are done in two counties, the action may be brought in either, *Naylor v. Sharpless and Others*, 23
2. A *mis-trial* is not aided by the 16. & 17. Car. 2. c. 8 unless the *venue* be laid in the proper county, *ibid.* 24
3. The Court will not change *the venue* in an action for defamatory words on the statute 2. Rich. 2. c. 5. *Marquis of Dorchester's Case*, 216
4. The reason why the Court will not change the *venue* in this action, 217. *notis*
5. But in such action, if justice cannot probably be had, by reason of the great influence of either of the parties in the place where the action is laid, the Court will change the venue, *Lord Shaftesbury's Case*, 217. *notis*
6. The *venue* changed from *London* to *Middlesex* on the application of the plaintiff, because one of his witnesses was *a Jew*, and all the sittings in *London* were on *a Saturday*, 272

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. A verdict will not aid a mis-trial in an improper county, *Naylor v. Sharpless*, 24

. A verdict will aid the omission of *hucusque* in an action on a promise in consideration of forbearing, averring, that he did *extunc totaliter abstinere*, &c. *Edwards v. Roberts*, 24

3. In trespass of assault and battery by husband and wife against husband and wife, a verdict finding the defendant's wife guilty, and *quoad residuum* not guilty, cures the declaration, *Hocket and his Wife v. Stiddolph and his Wife*, 66
4. In debt on bond made in *London*, if issue be joined on a plea that it was made in *Middlesex*, a verdict will not aid; for the issue is *immaterial*, and the 32. Hen. 8. c. 30. only cures *informal* issues, *Peck v. Hill*, 137
5. If, in an action against an executor, issue be joined whether he had assets on a particular day, it is an *immaterial issue*, and not aided by a verdict, *Read v. Dawson*, 139
6. Verdict cures the defect of not stating *title* in a disturber on an action under a promise to keep the plaintiff in quiet possession of a house, *Major v. Grigg*, 213
7. A verdict cures the mis-recital of the commencement of a particular statute, *Spring v. Eve*, 241
8. A special verdict in *assumpsit* for the profits of a patent office, finding that the defendant had received the profits for *seven years*, is good, although it appear that the patent was only *two years* old, *Arris v. Stukeley*, 263

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In what case usage shall be evidence of right, 278

USES.

1. If *A.* being seised in fee make a jointure on his wife for life, and die without issue, and the lands descend to his brother and heir, who grants a rent-charge of so much *per annum* to

trustees for the use of the widow in lieu of her dower, this rent-charge is *executed* by the statute of Uses, *Cook v. Herle*, 138
2. Where a man shall take by way of springing use, 208
3. Uses are not favoured in law, 210
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5. A use may be raised by the reservation of a *pepper-corn* to make a tenant to the *præcipe*, 249
6. In what case the statute 27. Hen. 8. c. 10. creates a use till a future use comes *in esse*, 208
7 If there be a covenant to stand seised to the use of *A.* for life, with remainder to *B.* in fee, and *A.* refuse, the covenantor shall enjoy it till the death of *A.* by way of *springing use*, *Southcot v. Stowell*, 209
8. If a man covenant with *B.* that if he do not marry he will stand seised to the use of *B.* and his heirs, and *B.* dies, and the covenantor do not marry, the use arises as well to the heir of *B.* as to *B.* himself if he had been living, and he shall have the land in nature of a discent, *Southcot v. Stowell*, 209

USURY.

1. By 12. Ann. st. 2. c. 16. "No person "upon any contract shall take, directly "or indirectly, for loan of any monies, "wares, merchandize, or other commodity, above five *per cent.*; and "all bonds, contracts, and assurances, "for payment of any principal or "money to be lent, or covenanted to "be performed upon or for any usury, whereupon or whereby there "shall be reserved or taken above the "rate of five *per cent.* shall be void, 279
2. By 12. Ann. st. 2. c. 16. "Every "person who upon any contract shall "take, accept, and receive, by way of "corrupt bargain, more than five "*per cent.* shall forfeit treble the "value," 279
3 If *A.* be indebted to *B.* on an *usurious contract*, and he be indebted to *C.* in the same sum for *a just debt*, and *A.* in discharge of his debt to *B.* give *C.* his bond for the money, *C.* not being privy to the usury, the bond is good, *Ellis v. Warner*, 279
4. *Sed quære*; For a bill of exchange given upon an usurious consideration is void, even in the hands of an indorsee for valuable consideration, without notice of the usury, *Lowe v. Waller*, 279. *notis*
5 But to avoid *a specialty* by reason of usury, the *contract* itself must be usurious; for if the agreement be honest at the time it is made, but the security be made otherwise by mistake, it is not void, *Ballard v. Oddey*, 307

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1. If *A.* being tenant for life, with remainder in tail to his son *B.* remainder to the right heirs of *A.* levy a fine with *warranty* to the use of *C.* in fee, the warranty is annexed to and runs with the land, *Williamson v. Hancock*, 14
2. In every warranty two things are implied, a *voucher* and a *rebutter*, 14
3. If a warranty be made to a man and his heirs, the assignee, though not named, shall *rebut*, but he cannot *vouch*, 15
4. By 4. Ann. c. 16. s. 21. all warranties made by tenant for life, the same descending to any person in remainder or reversion, is void, 17. *notis*
5. And all collateral warranties by any ancestor who has no estate of inheritance in the lands conveyed are void against the heir, 17. *notis*

WASTE.

Waste is a mixed action, and favouring of the *realty*, which is the most worthy, draws over the *personalty* with it; and therefore an action for waste by one tenant in common alone is good; for though they must join in the personalty where damages are to be recovered, yet they shall always sever in the realty, *Curtis v. Bourn*, 62

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2. The re-publication of a will can only make it a new will so far as the old will would go, if, instead of being re-published only, it had been newly made at the time of re-publication, 313
3. The ecclesiastical court is to judge, Whether a person is or is not capable of making a will, 315

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2. *Quære*, If in an action for words laid two ways, and the last count is *cumque etiam*, be good? *Escourt v. Cole*, 58
3. An action will lie on the statute 2. Rich. 2. c. 5. for saying to a nobleman, "You are not for the king, "but for sedition and for a common-"wealth, and by God we will have "your head at the next session of "parliament," *The Earl of Shaftesbury v. Lord Digby*, 98
4. An action will not lie in the superior courts for calling a woman "*a whore*," unless it be the cause of some temporal damage, *Osborn v. Wright*, 296
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END OF THE SECOND VOLUME.